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Supreme Court of the United States

OCTOBER TERM, A. D. 1927.

NO. 67

CITY OF HAMMOND, LAKE COUNTY, INDIANA,
A MUNICIPAL CORPORATION,
Petitioner,

vs.

SCHAPPI BUS LINE, INCORPORATED,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF AND ARGUMENT FOR PETITIONER.

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SUBJECT INDEX.

PAGE

Appendix A—Statutory Provisions 93-105

Appendix B—Provisions from the Constitution of the State of Indiana 106-107

Appendix C—Opinion of Lake Superior Court 108-115

Argument:

I. Ordinance 1945 is not unconstitutional as violative of the fourteenth amendment or of the constitution of the state of Indiana 24-49

A. Ordinance 1945 is not in conflict with any provision of the constitution of the state of Indiana 24-25

B. Ordinance 1945 is not in conflict with the due process clause of the fourteenth amendment 25-30

C. Ordinance 1945 is not in conflict with the equal protection clause of the fourteenth amendment 31-49

II. Ordinance 1945 is not invalid as unduly interfering with the interstate motor coach operations of respondent 49-63

III. Petitioner has authority under the Indiana law to enact ordinance 1945 63-74

IV. Respondent is illegally operating in intrastate motor bus service in Indiana. No injunction should have been granted protecting these illegal operations of respondent 74-90

A. If for no other reason, the purported certificates held by respondent are invalid because they were issued to a foreign corporation 75-76

B. The public service commission of Indiana has no jurisdiction to grant certificates of public convenience and necessity covering common carrier motor bus service within the city of Hammond 76-90

PAGE

Conclusion 90-92
Decision of United States Circuit Court of Appeals, Seventh Circuit 9-10
Decision of United States District Court 9
Errors Relied Upon by Petitioner 11
Reference to Official Report of Opinion of United States Circuit Court of Appeals, Seventh Circuit 2
Statement of Case 2-11
Summary of Argument 12-23

INDEX TO CASES CITED.

Allen v. City of Bellingham, 95 Wash. 12 42
American Transit Company v. City of Philadelphia, 18 F. (2d) 991 52
Armour & Company v. State of North Dakota, 240 U. S. 510 46
Atlantic Coast Line Railroad Company v. State of Georgia, 234 U. S. 280 ..... 46, 60
Baker v. City of Grand Rapids, 142 Mich. 687 89
Barrett v. Indiana, 229 U. S. 26 ..... 34, 45
Buck v. Kuykendall, 267 U. S. 307 ..... 50, 53
Bunting v. Oregon, 243 U. S. 426 92
Bush Co. v. Malloy, 267 U. S. 317 30
Canada Atlantic Transit Company v. City of Chicago, 210 Fed. 7 37
City of Louisville v. Louisville Home Telephone Co., 279 Fed. 949 89
City of San Antonio v. Fetzer, 241 S. W. 1034 (Texas Civ. App.) 29, 41
Clark v. Darr, 156 Ind. 692 87
Clark v. Poor, 47 Sup. Ct. 702 ..... 51, 56, 63
Cleveland &c. Ry. Co. v. Illinois, 177 U. S. 514 54
Cooley v. Board of Wardens of Port of Philadelphia, 12 How. 299 54
Decker v. City of Wichita, 109 Kans. 796 ..... 30, 42
Denver v. City of Muncie, 197 Ind. 28 ..... 27, 29, 41, 67, 69

PAGE

Denver & Rio Grande Railroad Company v. Denver, 250 U. S. 241 57

Dominion Hotel, Incorporated v. State of Arizona, 249 U. S. 265 47

Desser v. City of Wichita, 96 Kans. 820 27

Dreyer v. City Council of Union City, 134 Atl. 624 (N. J.) 28

Erb v. Morasch, 177 U. S. 584 45

Erie Railroad Company v. Board of Public Utility Commissioners, 254 U. S. 394 56

Escanaba Company v. Chicago, 107 U. S. 678 59

Ex parte Dickey, 76 W. Va. 576. 28

Farmers' & Merchants' Co-Operative Telephone Company v. Boswell Telephone Company, 187 Ind. 371 ..... 25, 68, 71

Frick v. City of Gary, 192 Ind. 76 ..... 29, 41, 66, 69

Fritz v. Presbrey, 44 R. I. 207 29

Gentile v. State, 29 Ind. 409 80

Gill v. City of Dallas, 209 S. W. 209 (Texas Civ. App.) ..29, 42

Greene v. City of San Antonio, 178 S. W. 6 (Texas Civ. App.) 26

Hendrick v. Maryland, 235 U. S. 610 56

Hennington v. Georgia, 163 U. S. 299 60

Hess v. Pawloski, 47 Sup. Ct. 632 51

Highway Motor Bus Co. v. City of Lansing, 238 Mich. 146 72

In re Cardinal, 170 Cal. 519 42

Interstate Bussea Corporation v. Blodgett, 19 F. (2d) 256 52

Interstate Busses Corporation v. Holyoke Street Railway Company, 273 U. S. 45 ..... 51, 56

Jeffrey Manufacturing Company v. Blagg, 235 U. S. 571 34

Johnson v. Board of Commissioners, 107 Ind. 15 83

Jose v. Utley, 185 Cal. 656 90

Kane v. New Jersey, 242 U. S. 160 56

Keokee Coke Co. v. Taylor, 234 U. S. 224 35

Lake Shore, etc. Railway Co. v. Ohio, 173 U. S. 285 ....60, 62

Lane v. Whitaker, 275 Fed. 476 26

PAGE

Lindsley v. Natural Carbonic Gas Company, 220 U. S. 61 ..... 32, 36
Longworth v. City of Evansville, 32 Ind. 322 82
Lutz v. New Orleans, 235 Fed. 978 28
Manigault v. Springs, 199 U. S. 473 36
Marion, B. & E. Traction Co. v. Simmons, 180 Ind. 289 87
Maule Coal Co. v. Partenheimer, 155 Ind. 100 86
Memphis v. State ex rel. Ryals, 133 Tenn. 83 26
Memphis Street Railway v. Rapid Transit Company, 133 Tenn. 99 42
Middleton v. Texas Power & Light Company, 249 U. S. 152 36
Minnesota Rate Cases, 230 U. S. 352 55
Missouri v. Lewis, 101 U. S. 22 84
Missouri, Kansas and Texas Railway Company v. May, 194 U. S. 267 35
Mode v. Beasley, 143 Ind. 306 82
Morgan's S. S. Co. v. Louisiana Board of Health, 118 U. S. 455 60
Morris v. Duby, 47 Sup. Ct. 548 51
Mull v. Indiana & C. Traction Co., 169 Ind. 214 87
Mutual Loan Co. v. Martell, 222 U. S. 225 33
New York, New Haven and Hartford Railroad Company v. New York, 165 U. S. 628 ..... 44, 60
Packard v. Banton, 264 U. S. 140 ..... 26, 41
Packet Company v. Cattlettsburg, 105 U. S. 559 60
Peoples Transit Company v. Henshaw, 20 F. (2d) 87..27, 41, 43
Pine Bluff v. Arkansas Traveler Bus Company, 171 Ark. 727 ..... 28, 42
Pittsburgh, C. C. & St. L. Ry. Co. v. Town of Crothersville, 159 Ind. 330 89
Radice v. New York, 264 U. S. 292 34
Rast v. Van Deman & Lewis Company, 240 U. S. 343.... 33
Red Star Motor Drivers' Association v. City of Detroit, 234 Mich. 398 ..... 29, 42
Schappi Bus Line, Incorporated v. City of Hammond, 11 Fed. (2d) 940 2
Schoenfeld v. Seattle, 265 Fed. 726 28

PAGE

School City of Marion v. Forrest, 168 Ind. 94 83
Schultz v. City of Duluth, 163 Minn. 65 27
Sears v. Board of Commissioners of Warren County, 36 Ind. 267 24
Slovanian Association v. City of Portland, 111 Ore. 335 90
Smith v. Indianapolis Street Ry. Co., 158 Ind. 425 83
South Covington & Cincinnati Street Railway Company v. City of Covington, 235 U. S. 537 58
Springfield Gas & Electric Company v. City of Springfield, 257 U. S. 66 84
Sprout v. City of South Bend, 198 Ind. 563 .....52, 68,69
St. Louis, Iron Mountain & Southern Railway Company v. State of Arkansas, 240 U. S. 518 46
State v. Arnold, et al. 140 Ind. 628 87
State v. Denny, 118 Ind. 449 65
State v. Kolsem, 130 Ind. 434 81
State v. Stickelman, 182 Ind. 102 .....25, 65
Transportation Company v. Parkersburg, 107 U. S. 691 .. 60
Twin City Bus Lines, Incorporated v. City of Hammond, Lake Superior Court (number 29374) 72
Village of Cedar Springs v. Schlick, 81 Mich. 405 90
Village of Euclid, Ohio v. Ambler Realty Co., 47 Sup. Ct. 114 .....33, 38
Western Union Telegraph Co. v. Braxtan, 165 Ind. 165.. 88
Winfield v. Public Service Commission, 187 Ind. 53 66
Young v. The Board of Commissioners, 137 Ind. 323 83
Zahn v. Board of Public Works of City of Los Angles, 47 Sup. Ct. 594 36

Index to Statutes.

	PAGE
Act and Resolves of Massachusetts 1926, c. 163	72
Acts of Indiana 1905, c. 129 Sec. 53, subdi. 31, 32, 38, 53	65
Acts of Indiana 1905, c. 129, Sec. 254	68
Acts of Indiana 1905, c. 129, Sec. 269	65
Acts of Indiana 1911, c. 104, Sec. 2	65
Acts of Indiana 1913, c. 76, Sec. 97	65, 68
Acts of Indiana 1913, c. 76, Sec. 99	75-76
Acts of Indiana 1913, c. 76, Sec. 110	65
Acts of Indiana 1913, c. 300, Sec. 17	69
Acts of Indiana 1925, c. 46	5, 69, 70-72, 76-78
Acts of Indiana 1925, c. 213, Sec. 45	6, 69, 70
2 Laws of New York 1919, c. 307	72
Laws of Wisconsin 1915 c. 546	72

Index to Constitutional Provisions.

Constitution of the State of Indiana, Art. I, Sec. 23	24
Constitution of the State of Indiana, Art. IV, Sec. 19	85
Constitution of the State of Indiana, Art. IV, Sec. 22	79
Constitution of the State of Indiana, Art. IV, Sec. 23	80
Constitution of the United States, Art. I, Sec. 8	49, 63
Constitution of the United States, Fourteenth Amendment	25, 49, 83-84

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF AND ARGUMENT FOR PETITIONER.*

To the Honorable the Justices of the Supreme Court of the United States:

Petitioner desires to present to this court an additional argument supplementing the short brief and argument presented in connection with the petition for writ of certiorari filed in this cause.

*Note: Throughout this brief and argument, where any quoted words or sentences are italicized the italics are ours unless otherwise noted.

A statement of the grounds on which the jurisdiction of this court is invoked appears in the brief of petitioner filed with the petition for writ of certiorari, beginning on page 10 thereof.

The opinion of the United States circuit court of appeals was filed on March 12, 1926. (R. 101-105.) It is reported in 11 Fed. (2d) 940 (1926).

The appeal taken by respondent to the United States circuit court of appeals, was from the action of the United States district court, in denying a temporary injunction against the enforcement of ordinance 1945. It is apparent from the opinion of the circuit court, however, that that court treated the case as one arising upon an appeal from a final rather than interlocutory order, and decided as a matter of law that the ordinance was invalid. Petitioner in presenting to this court its brief in this cause, has likewise treated the case as an appeal from a final order and omitted any argument which would be applicable only to an interlocutory appeal. This court should not however lose sight of the fact that it must not be assumed that petitioner on final hearing could not show additional reasons for the need of some such regulation as that provided for by ordinance 1945.

STATEMENT OF THE CASE.

This case necessarily involves a determination of the validity of a municipal ordinance and state statutes. The brief statement of the case contained in the petition for a writ of certiorari is inadequate as a foundation for a clear consideration of the merits of the issues involved. We believe that it will materially assist the court if, instead of merely supplementing the statement contained in the petition, we here give a statement of the case.

Whenever a court finds it necesssary to pass upon the construction or the constitutionality of a statute or ordinance,

it is important that the court have before it the situation existing at the time the act was passed and to which the act applies. We deem it important at this point to give the court, concisely, a statement of this situation. We have endeavored to set out only those facts in the record which will be beneficial to this court or needed by it in order to pass intelligently upon the problems of statutory construction and constitutionality.

The city of Hammond is a municipal corporation of the state of Indiana with a population of about 60,000 people. (R. 8, 30.) It is situated in the northwestern part of the state, lies along the Indiana-Illinois state line and is contiguous to the city of Chicago. On the east of Hammond, and contiguous to it, are the cities of Whiting, East Chicago, and Gary, Indiana. All of said cities, including Hammond, border on Lake Michigan and are a part of the extensive industrial territory known as the Calumet region. (R. 8, 56, 62 [map].) Numerous railroads pass through petitioner city, all operating at grade. (R. 54-55, 62 [map].) The central part of the business section is located on Hohman street between Michigan avenue and Rimbach avenue; on State street between Morton court and Sohl street; on Sibley street between Oakley avenue and Morton court, and on Fayette street between Hohman street and Oakley avenue. (R. 54.) The corner of State and Hohman streets has been generally referred to as the principal business corner of the city. (R. 55.) See map in record. (R. 62.)

The center of this business section is cut by four railroads: the double track of the Erie Railroad, the double track of the New York, Chicago and St. Louis Railroad and the single track of the Chicago, Indianapolis & Louisville Railroad, all with contiguous rights of way cutting through Fayette, Sibley, State and Hohman streets in the very heart of this district, and the four tracks of the Michigan Central Railroad intersecting at grade, a block north of State street, the three

other named railroads and Hohman street. The traffic over all these railroads is very heavy, consisting both of passenger and freight traffic. Many hundreds of cars are moved each day across these streets and frequently freight trains of more than a half mile in length are slowly drawn across said streets. (R. 54-55.) See map in record. (R. 62.)

Hohman street, in the main downtown district, is sixty feet in width and has a single street car track in the center; State street, in the district hereinbefore described, is also sixty feet in width and has thereon a double street car track east of Hohman street and a single street car track west of Hohman street. Sibley street, in the district above described, has a double street car track east of Hohman street and a single street car track west of Hohman street. (R. 54.)

As a result of the aforesaid conditions, traffic congestion in the city of Hammond has become a serious and difficult problem. Vehicular traffic on the streets in and adjacent to that part of the business district described is very heavy. (R. 55.) The problem of reducing this congestion is of added difficulty because of the frequent crossing blockades resulting from the operation of the railroads. (R. 56.) For several years prior to 1924 the city suffered the experience of having added to the traffic congestion on its streets a fleet of several hundred jitneys, and experienced the difficulties attendant to, and the added congestion created by, this jitney operation, and particularly by their stopping to load and unload passengers. (R. 55.)

During the year 1924, by ordinance of the city, the jitney business was finally eliminated and thereby congestion somewhat reduced. Shortly thereafter the city entered into a franchise agreement with Calumet Motor Coach Company authorizing and requiring that company to furnish to the city of Hammond, a system of local transportation by motor coach. Thereafter, in November, 1924, the Calumet Motor Coach Company, over fixed routes and on a regular schedule of service, commenced, and has since continued, to furnish

regular public transportation service within the city. (R. 55-7.) After the elimination of the jitneys and the establishment of a local motor bus service under franchise, a large number of other motor busses commenced operating into the city, and engaged in the business of hauling passengers between Hammond and other municipalities. None of these have been authorized by franchise or contract from the city of Hammond, to give a local transportation service. They have operated at times that suited their convenience and almost uniformly into and through the congested business district. They added greatly to the return of the congestion and confusion which existed on the streets of the city prior to the elimination of the jitneys. (R. 55-56.)

On April 25, 1925, the legislature of the state of Indiana amended its public utility laws by declaring that motor coaches operated for hire should be declared public utilities and placing them, subject to certain exceptions, under the jurisdiction of the public service commission of Indiana. This act is commonly known as and will hereafter be referred to as the Moorhead act. (appendix 99-103.) The act provides, however, by section 5 that in towns and cities in which, prior to the date of the act, motor coach service was being given under contract or franchise, and in towns and cities contiguous thereto, the local authorities should "continue to supervise, control, permit, contract for and regulate such service and to determine when, if at all, for public convenience and necessity competing service should be established."

This act further provides by section 10 that none of the provisions of the act shall "operate to deprive the state highway commission of Indiana *or any other public authorities* of *any* jurisdiction it or they now has or have or which may hereafter be conferred upon it or them over the public highways of the state,".

At the same legislative session there was enacted a statute providing, in general, regulation for the registration and

licensing of and the use and operation of motor vehicles. Section 45 of this general regulatory act, which is identical with a similar section which was in effect at the time of the enactment of the general regulatory act of 1925, expressly provides that the act shall not be construed as affecting the power of municipalities to make and enforce ordinances, rules and regulations effecting motor driven commercial vehicles used within their limits for public hire. (Acts of Indiana, 1925, c. 213, sec. 45, p. 598. See also Acts of Indiana 1913, c. 300, sec. 17, p. 790.)

In order to relieve the intolerable situation above described, the common council of the city of Hammond, on May 22, 1925, passed ordinance 1945,—a regulatory ordinance dealing with the problem of traffic congestion by controlling and limiting the uses made of the streets by common carrier motor vehicles. (R. 56).

Section 1 of this ordinance prohibits the operation of motor coaches for hire on parts of certain streets, which parts of streets extend from one to four blocks in the heart of the down town business district. (R. 51; 62 [map].)

These parts of streets are as follows:

> Hohman street, from Russell street to Michigan avenue; State street, from Morton court to Calumet avenue; Sibley street, from the easterly line of the Chicago, Indianapolis & Louisville Railway Company, westerly to Morton court; Fayette street, from Hohman street to Oakley avenue.

Hohman street is the main north and south street, and State street is the main east and west street of the city. The intersection of State and Hohman streets is the down town business center. Russell street is three blocks south of State street. Michigan avenue is four blocks north of State street. Morton court is one block west of Hohman street and Calumet avenue is four blocks east of Hohman street, going east on State street. Sibley street is an east and west street and is one block south of State street. The

easterly line of the right of way of the Chicago, Indianapolis & Louisville Railway Company, intersecting Sibley street, is less than a block east of Hohman street. Morton court, intersecting Sibley street, is one block west of Hohman street. Fayette street is an east and west street, one block south of Sibley street, and Oakley avenue intersects Fayette street one block east of Hohman street.

A scrutiny of these intersections (see map R. 62) discloses that section 1 only prohibits busses from passing over those parts of these main streets of the city which are from one block to four blocks distant from the business center of the city. All of these main streets, except these particular portions thereof, and all other streets of the city (except where trucks are forbidden) are open for the passing of motor vehicles of every kind, including busses.

It will be noted that Plummer avenue, an east and west street improved with concrete and not more than a half block north of State street, is entirely open for bus travel; thereby any bus can get practically to the center of the downtown business district by a detour of one block each way from Hohman street; that is to say, to Morton court west of Hohman street, and to Oakley avenue east of Hohman street. Michigan avenue to the north of State street, intersects both Hohman street and Oakley avenue and is improved with concrete. Plummer avenue intersects Morton court.

Section 2 of the ordinance prohibits all busses from stopping on any of the public ways of the city for the purpose of receiving or discharging passengers; but it contains a proviso that the board of public works may grant permits for six months or successions thereof authorizing non-local carriers to stop to receive and discharge passengers on certain streets leading into the central business district (R. 52; 62 [map]). It must be kept in mind that section 2 applies only to the use of the streets as loading zones and does not undertake to prohibit passing over any of the streets of the city.

Ordinance 1945 contains no prohibitions other than those set out in sections 1 and 2. Section 3 permits carriers giving an authorized local transportation service to use the restricted streets.

At the time of the commencement of this suit, respondent in this case was operating motor coaches as a common carrier of passengers for hire over three routes: one between the city of Chicago, Illinois and petitioner city of Hammond, Indiana; one between the city of Calumet City, Illinois and petitioner city of Hammond and East Chicago, Indiana; and the third between petitioner city of Hammond, Indiana and the city of East Chicago, Indiana. (R. 3, 5-6, 7-8). It is important to note that, within the city of Hammond, these routes are almost wholly over streets on which street car tracks are located. (R. 3, 6, 62 [map]).

Each of the two interstate routes, upon crossing the Indiana-Illinois state line into Indiana, is immediately within the limits of petitioner city. (R. 62 [map]). The city of East Chicago, Indiana, lies east of and is contiguous to petitioner city. (R. 56, 62 [map]). Respondent has at no time operated in Indiana except within the city limits of petitioner city of Hammond and a contiguous city. (R. 3-8). No question as to the validity (under the Indiana law) of the ordinance as applied to a carrier running into Hammond from non-contiguous towns, under certificate from the state is therefore pertinent to the case at bar.

Respondent claims the right to carry on both an interstate business, a local business in each of the Indiana cities, and an intercity business between such cities. Its interstate operations are, of course, protected by the commerce clause of the federal constitution from state or municipal regulations unduly burdening such operation. For its local and intercity service in Indiana it relies upon certain certificates received from the public service commission of Indiana, by which the commission purported to authorize operation over these routes. (R. 35-50). These certificates, respondent insists

give it the right to carry on a local business within petitioner city and upon the identical routes over which the Calumet Motor Coach Company operates, and is required and authorized to operate, under its franchise. (R. 3-8, 55).

The city made no attempt to prevent respondent from operating upon any streets in the city except from one to four blocks each way in the congested part of the down town business district. Respondent, however, denied the right of the city to prevent its operation over even these few parts of streets and also the power of the city to prevent its stopping to load and unload passengers on any street in the city. The record does not show that respondent made any attempt to secure from the board of public works of the city a permit to stop to load and unload passengers on any streets in the city. Respondent claims its right so to do without permit, and also claims the right to operate over the prohibited portions of streets in defiance of the municipal regulations. For violation of the city ordinance, the drivers of respondent were arrested. Thereafter respondent sought by injunction to prevent the city from making these arrests. The United States district court denied a temporary injunction and from this order respondent appealed to the United States circuit court of appeals, seventh circuit. That court considered the issues and passed upon the case as though it came up from a final decree. This is clearly shown by the language of the opinion. That court reversed the order of the district court and directed the district court to enter an injunction prohibiting the municipality from enforcing against respondent any of the provisions of ordinance 1945. The circuit court of appeals held invalid as unreasonable the regulations provided for by both section 1 and section 2 of the ordinance. Petitioner city then brought the case to this court by a petition for a writ of certiorari.

As to the interstate business, the argument for respondent against the validity of petitioner's ordinance is necessarily premised upon the contention that the ordinance is prohibited

by and in conflict with the commerce clause; or, if this contention fail, that a state or its municipal agent cannot classify between, or regulate in a different manner, the authorized local city carrier and the interstate carrier. As to the intra-state business, local and intercity, respondent's argument against the ordinance necessarily rests upon the claim that the certificates which it has received from the public service commission of Indiana are valid and that petitioner cannot regulate the use of its streets by a certificated carrier. If the certificates are void, then as to such business respondent has no standing to complain against the ordinance, for it is operating unlawfully in such carrier service. Even if the certificates are valid, respondent must still show that, under the Indiana law, these have the effect of destroying the city's power of regulating the manner of use of its streets.

The opinion of the circuit court of appeals avoids decision on any of these questions except the question of the constitutionality of the ordinance under the fourteenth amendment and the Indiana constitution. That court obviously decided that the equal protection clause of the fourteenth amendment was violated by the ordinance. Apparently, it also thought that the respondent was deprived of property without due process; and it must have had in mind the idea that the local regulation was in conflict with the privilege and immunities section of the Indiana constitution.

In its holding the circuit court was clearly in error. We do not believe that it is difficult to establish the untenability of each of these grounds relied upon by that court to invalidate the ordinance. We are aware, however, that the establishment of such fact does not settle the controversy. It still remains necessary to show that the ordinance does not violate any other constitutional provisions, either of the United States or of the state of Indiana, and that the regulation is within the power possessed by petitioner city under the Indiana law.

In order to avoid confusion, we shall discuss in the following order the legality of ordinance 1945 and show:

I. Ordinance 1945 is not unconstitutional as violative of the fourteenth amendment or of the constitution of the state of Indiana.

II. Ordinance 1945 does not unduly burden or interfere with interstate commerce.

III. Ordinance 1945 is within the power of the city to enact being authorized by the laws of the state of Indiana.

We shall also show the court:

IV. The certificates of public convenience and necessity upon which respondent relies are void. Respondent is illegally operating in intrastate motor bus service in Indiana. No injunction should have been granted protecting these illegal operations of respondent.

ERRORS RELIED UPON BY PETITIONER.

The errors assigned by petitioner in this cause are set out in the brief of petitioner filed with the petition for writ of certiorari, beginning on page seventeen thereof. In asking this court to reverse the decision of the United States circuit court of appeals, seventh circuit, petitioner urges and relies on each of the eight errors there assigned. The argument of petitioner here presented supports the claim made by petitioner as to each error assigned. Point I of this brief presents to this court the arguments of petitioner to sustain its claim of errors as set forth in each of the assignments made. Points II and III of this brief present additional arguments of petitioner in support of petitioner's eighth assignment of error. Point IV presents additional arguments of petitioner in support of petitioner's first and eighth assignments of error.

SUMMARY OF ARGUMENT.

I.

ORDINANCE 1945 IS NOT UNCONSTITUTIONAL AS VIOLATIVE OF THE FOURTEENTH AMENDMENT OR OF THE CONSTITUTION OF THE STATE OF INDIANA.

A.

ORDINANCE 1945 IS NOT IN CONFLICT WITH ANY PROVISION OF THE CONSTITUTION OF THE STATE OF INDIANA.

Respondent is an Illinois corporation. The provisions of section 23 article I of the constitution of the state of Indiana cannot be invoked by a non-resident of Indiana.

Sears v. *Board of Commissioners of Warren County*, 36 Ind. 267 (1871).

Even if applicable this constitutional provision could not be relied upon to defeat the power of a municipality to limit the uses which may be made of its streets by a public utility.

State v. *Stickelman*, 182 Ind. 102, (1914).

Farmers & Merchants' Co-operative Telephone Company v. *Boswell Telephone Company*, 187 Ind. 371, (1918).

B.

ORDINANCE 1945 IS NOT IN CONFLICT WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

One engaged in the conduct of his business on the streets without obtaining a franchise so to do has no property right to continue using the streets in his business.

Packard v. *Banton*, 264 U. S. 140 (1923).

Greene v. *City of San Antonio,* 178 S. W. 6, (Texas Civ. App.—1915)
Memphis v. *State ex rel. Ryals,* 133 Tenn. 83 (1915).
Lane v. *Whitaker,* 275 Fed. 476 (1921).
Peoples Transit Company v. *Henshaw,* 20 F. (2d) 87 (1927).
Desser v. *City of Wichita,* 96 Kans. 820, (1915).
Schultz v. *City of Duluth,* 163 Minn. 65, (1925).
Denny v. *City of Muncie,* 197 Ind. 28, (1925).
Ex parte Dickey, 76 W. Va. 576, (1915).
Schoenfeld v. *Seattle,* 265 Fed. 726 (1920).
Lutz v. *New Orleans,* 235 Fed. 978 (1916).

A fortiori, the state or its authorized municipal agent may regulate and restrict the extent of use of the streets in carrying on the private business of a common carrier of passengers for hire.

Pine Bluff v. *Arkansas Traveler Bus Company,* 171 Ark. 727, (1926).
Dreyer v. *City Council of Union City,* 134 Atl. 624 (N. J.—1926).
Gill v. *City of Dallas,* 209 S. W. 209 (Tex. Civ. App.—1919).
Frick v. *City of Gary,* 192 Ind. 76, (1922).
Denny v. *City of Muncie,* 197 Ind. 28, (1925).
City of San Antonio v. *Fetzer,* 241 S. W. 1034 (Texas Civ. App.—1922).
Red Star Motor Drivers' Association v. *City of Detroit,* 234 Mich. 398, (1926).
Fritz v. *Presbrey,* 44 R. I. 207, (1922).
Decker v. *City of Wichita,* 109 Kans. 796, (1921).

C.

ORDINANCE 1945 IS NOT IN CONFLICT WITH THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

In deciding this case, the circuit court of appeals has substituted its judgment as to the necessity of this ordinance, for the judgment of the city council.

See opinion of circuit court of appeals,—

Schappi Bus Line, Incorporated v. *City of Hammond*, 11 F. (2d) 940, (1926).

The circuit court has overlooked fundamental principles which must be kept in mind when determining whether the equal protection clause of the fourteenth amendment invalidates a municipal act.

When a classification made by the state or its municipal agent is called into question, if any set of facts can reasonably be conceived that would sustain it, the act will be upheld.

Lindsley v. *Natural Carbonic Gas Company*, 220 U. S. 61, 78 (1910).

Village of Euclid, Ohio v. *Ambler Realty Co.*, 47 Sup. Ct. 114 (1926).

Rast v. *Van Deman & Lewis Company*, 240 U. S. 342 (1915).

Mutual Loan Co. v. *Martell*, 222 U. S. 225, 235 (1911).

Classification is not reviewable unless palpably arbitrary, nor is the fourteen amendment an excuse for courts' invading the legislative province.

Radice v. *New York*, 264 U. S. 292 (1923).

Jeffrey Manufacturing Company v. *Blagg*, 235 U. S. 571, 576-7 (1914).

Barrett v. *Indiana*, 229 U. S. 26, 29-30 (1912).

Missouri, Kansas and Texas Railway Company v. *May*, 194 U. S. 267 (1903).

Keokee Coke Co. v. *Taylor,* 234 U. S. 224, 227 (1913).

Manigault v. *Springs,* 199 U. S. 473, 480-1 (1905).

One who complains against legislative classification carries the burden of clearly showing that it is unreasonable and arbitrary. The presumption is always in favor of the constitutionality of the act.

Lindsley v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 79 (1910).

Middleton v. *Texas Power & Light Company,* 249 U. S. 152, 158 (1918).

Zahn v. *Board of Public Works of City of Los Angeles,* 47 Sup. Ct. 594 (1926).

Canada Atlantic Transit Company v. *City of Chicago,* 210 Fed. 7, 11 (1913).

Classifications between common carriers performing different types of transportation services, have been repeatedly upheld.

Packard v. *Banton,* 264 U. S. 140 (1923).

Peoples Transit Company v. *Henshaw,* 20 F. (2d) 87 (1927).

Frick v. *City of Gary,* 192 Ind. 76 (1922).

Denny v. *City of Muncie,* 197 Ind. 28 (1925).

City of San Antonio v. *Fetzer,* 241 S. W. 1034 (Texas Civ. App.—1922).

Red Star Motor Drivers' Association v. *City of Detroit,* 234 Mich. 398 (1926).

In re Cardinal, 170 Cal. 519 (1915).

Decker v. *City of Wichita,* 109 Kans. 796 (1921).

Allen v. *City of Bellingham,* 95 Wash. 12 (1917).

Memphis Street Railway v. *Rapid Transit Company,* 133 Tenn. 99 (1915).

Gill v. *City of Dallas*, 209 S. W. 209 (Texas Civ. App.—1919).

Pine Bluff v. *Arkansas Traveler Bus Company*, 171 Ark. 727 (1926).

The courts have uniformly refused to hold arbitrary and invalid, classifications made by states or their municipal agents, to which far stronger objections could be made, than exist in the case at bar.

Peoples Transit Company v. *Henshaw*, 20 F. (2d) 87 (1927).

New York, New Haven and Hartford Railroad Company v. *New York*, 165 U. S. 628 (1896).

Erb v. *Morasch*, 177 U. S. 584 (1899).

Barrett v. *Indiana*, 229 U. S. 26, 29-30, (1912).

Atlantic Coast Line Railroad Company v. *State of Georgia*, 234 U. S. 280 (1913).

Armour & Company v. *State of North Dakota*, 240 U. S. 510 (1915).

St. Louis Iron Mountain & Southern Railway Company v. *State of Arkansas*, 240 U. S. 518 (1915).

Dominion Hotel, Incorporated v. *State of Arizona*, 249 U. S. 265 (1918).

II.

ORDINANCE 1945 IS NOT INVALID AS UNDULY INTERFERING WITH THE INTERSTATE MOTOR COACH OPERATIONS OF RESPONDENT.

So long as it does not act unreasonably, the state or its authorized agent, in the absence of federal regulation, has the power to regulate the manner of use which may be made of its highways for the private business of interstate common carrier service.

Buck v. *Kuykendall*, 267 U. S. 307 (1924).

Bush Co. v. *Malloy*, 267 U. S. 317 (1925).

Clark v. *Poor*, 47 Sup. Ct. 702 (1926).
Morris v. *Duby*, 47 Sup. Ct. 548 (1926).
Hess v. *Pawloski*, 47 Sup. Ct. 632 (1926).
Interstate Busses Corporation v. *Holyoke Street Railway Company*, 273 U. S. 45 (1926).
Sprout v. *City of South Bend*, 198 Ind. 563 (1926).
Interstate Busses Corporation v. *Blodgett*, 19 F. (2d) 256 (1927).
American Transit Company v. *City of Philadelphia*, 18 F. (2d) 991 (1927).

There is no discrimination against interstate carriers by ordinance 1945. The ordinance is a proper and legally valid exercise of local police power exerted for the public safety, convenience and welfare in the general use of overburdened streets. The regulations made by the ordinance do not unduly or directly burden interstate commerce. Interstate carriers are not immune from such regulation.

Buck v. *Kuykendall*, 267 U. S. 307 (1924).
Cooley v. *Board of Wardens of Port of Philadelphia*, 12 How. 299 (1851).
Cleveland &c. Ry. Co. v. *Illinois*, 177 U. S. 514 (1899).
Minnesota Rate Cases, 230 U. S. 352, 402 (1912).
Clark v. *Poor*, 47 Sup. Ct. 702 (1926).
Interstate Busses Corporation v. *Holyoke Street Railway Company*, 273 U. S. 45 (1926).
Kane v. *New Jersey*, 242 U. S. 160 (1916).
Hendrick v. *Maryland*, 235 U. S. 610 (1914).
Erie Railroad Company v. *Board of Public Utility Commissioners*, 254 U. S. 394 (1920).
Denver & Rio Grande Railroad Company v. *Denver*, 250 U. S. 241 (1918).
South Covington & Cincinnati Street Railway Company v. *City of Covington*, 235 U. S. 537 (1914).

Escanaba Company v. *Chicago*, 107 U. S. 678 (1882).
Atlantic Coast Line Railroad Company v. *State of Georgia*, 234 U. S. 280 (1913).
Transportation Company v. *Parkersburg*, 107 U. S. 691 (1882).
Morgan's S. S. Co. v. *Louisiana Board of Health*, 118 U. S. 455 (1885).
New York, New Haven and Hartford Railroad Company v. *New York*, 165 U. S. 628 (1896).
Lake Shore, etc. Railway Co. v. *Ohio*, 173 U. S. 285 (1898).
Hennington v. *Georgia*, 163 U. S. 299 (1895).
Packet Company v. *Catlettsburg*, 105 U. S. 559 (1881).

The commerce clause of the federal constitution cannot be used as a means to hamper local agencies in meeting and solving the problem of determining and adjusting the use to be made of the streets by various classes of users.

III.

PETITIONER HAS AUTHORITY UNDER THE INDIANA LAW TO ENACT ORDINANCE 1945.

The law of Indiana does not authorize respondent to operate common carrier motor bus service within the city of Hammond except with the consent of the city.

The legislative policy of Indiana has been to vest in municipal authorities almost exclusive control of the streets within the municipality.

Acts of Indiana 1905, c. 129, sec. 53, sub-divisions 31, 32, 38, and 53, pp. 250-2, 256.
Acts of Indiana 1905, c. 129, secs. 267 and 269, pp. 407-9.
Acts of Indiana 1911, c. 104, sec. 2, p. 181.

Acts of Indiana 1913, c. 76, secs. 97 and 110, pp. 200 and 205-6.
State v. *Stickelman*, 182 Ind. 102 (1914).
State v. *Denny*, 118 Ind. 449 (1889).
Winfield v. *Public Service Commission*, 187 Ind. 53 (1917).

Under this power to control its streets, the municipality may regulate and control motor carriers for hire seeking to use its streets.

Frick v. *City of Gary*, 192 Ind. 76 (1922).
Denny v. *City of Muncie*, 197 Ind. 28 (1925).
Sprout v. *City of South Bend*, 198 Ind. 563 (1926).

It has long been the legislative policy to allow no public utility to establish itself in a municipality without the consent of the municipality.

Acts of Indiana 1905, c. 129 sec. 254, p. 396 as amended by Acts of Indiana 1911, c. 104, sec. 2, p. 181.
Acts of Indiana 1913, c. 76, sec. 97, p. 200.

The legislative acts of 1925 did not deprive municipalities of the power to regulate and control the use of their streets by motor vehicle common carriers. The general motor vehicle regulatory act expressly provides that the power to control and regulate the use of the streets by motor driven commercial vehicles used for public hire shall remain with the municipality.

Acts of Indiana 1925, c. 213, sec. 45, p. 597-8.
Frick v. *City of Gary*, 192 Ind. 76 (1922).
Denny v. *City of Muncie*, 197 Ind. 28 (1925).
Sprout v. *City of South Bend*, 198 Ind. 563 (1926).

The provisions of the Moorhead act which declare that common carriers by motor bus are public utilities do not

withdraw from municipalities this power of regulating and controlling the use of their streets.

Acts of Indiana, 1925, c. 46, secs. 1-10, pp. 138-142.

In requiring motor bus common carriers to secure the consent of the municipality in, or through which they desire to operate, as well as to secure certificates of public convenience and necessity, the legislature made a requirement already existing in several states.

2 Laws of New York 1919, c. 307, p. 942.

Acts and Resolves of Massachusetts 1926, c. 163.

Laws of Wisconsin 1915, c. 546, p. 738.

Highway Motor Bus Co. v. *City of Lansing*, 238 Mich. 146 (1927).

IV.

RESPONDENT IS ILLEGALLY OPERATING IN INTRASTATE MOTOR BUS SERVICE IN INDIANA. NO INJUNCTION SHOULD HAVE BEEN GRANTED PROTECTING THESE ILLEGAL OPERATIONS OF RESPONDENT.

A.

IF FOR NO OTHER REASON, THE PURPORTED CERTIFICATES HELD BY RESPONDENT ARE INVALID BECAUSE THEY WERE ISSUED TO A FOREIGN CORPORATION.

A foreign corporation under the Indiana law cannot receive a permit or certificate to give local public utility service.

Acts of Indiana 1913 c. 76, sec. 99 p. 201.

Respondent to whom these purported certificates were issued by the public service commission is an Illinois corporation. The certificates for intrastate service are therefore void.

B.

THE PUBLIC SERVICE COMMISSION OF INDIANA HAS NO JURISDICTION TO GRANT CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY COVERING COMMON CARRIER MOTOR BUS SERVICE WITHIN THE CITY OF HAMMOND.

By a proviso contained in section 5 of the Moorhead act the legislature of Indiana has given petitioner the sole power to grant certificates of public convenience and necessity for common carrier motor bus service within the city of Hammond.

Acts of Indiana 1925, c. 46 sec. 5, pp. 140-1.

The proviso of section 5 is not unconstitutional. It is a general, not a local or special law within the meaning of section 23 of Article IV of the Indiana constitution. Even if it were local or special legislation, it would not be invalid. If the legislature passes a local or special law (on subjects other than those specifically enumerated in section 22 of article IV of the state constitution) the courts cannot and will not determine whether a general law could have been enacted. The question is purely a legislative one and the decision of the legislature is final.

Gentile v. *State*, 29 Ind. 409 (1868).
State v. *Kolsem*, 130 Ind. 434 (1891).
Longworth v. *City of Evansville*, 32 Ind. 322 (1869).
Mode v. *Beasley*, 143 Ind. 306 (1896).
Smith v. *Indianapolis Street Ry. Co.*, 158 Ind. 425 (1901).
Johnson v. *Board of Commissioners*, 107 Ind. 15 (1886).
School City of Marion v. *Forrest*, 168 Ind. 94 (1906).
Young v. *The Board of Commissioners*, 137 Ind. 323 (1893).

The proviso of section 5 does not violate the equal protection clause of the fourteenth amendment of the constitution

of the United States. The state may delegate to differe state agencies the control and regulation of like utilities.

Springfield Gas & Electric Company v. *City Springfield*, 257 U. S. 66, 70 (1921).
Missouri v. *Lewis*, 101 U. S. 22 (1879).

The proviso of section 5 is not unconstitutional by reas of section 19 of article IV of the Indiana constitution, pr viding that the subject of an act must be expressed in t title. The proviso is a part of the plan of regulating mot vehicle common carriers. This is what the title shows the a is to do. The Indiana supreme court has frequently pass upon the requirements of section 19 of article IV of the sta constitution. The Moorhead act is clearly within the limi of these requirements.

Maule Coal Co. v. *Partenheimer*, 155 Ind. 100 (190
Clark v. *Darr*, 156 Ind. 692 (1901).
State v. *Arnold, et al.*, 140 Ind. 628 (1894).
Marion, B. & E. Traction Co. v. *Simmons*, 180 In 289 (1913).
Mull v. *Indianapolis, etc., Traction Co.*, 169 Ind. 2 (1907).
Western Union Telegraph Co. v. *Braxtan*, 165 In 165 (1905).

Regardless of the question of the validity of ordinan 1945, respondent is not entitled to injunctive relief, unless can establish that it is lawfully operating in petitioner cit Since respondent has not taken the steps necessary in ord to secure the right to operate intrastate in petitioner city, is in equity with unclean hands and cannot procure injunctiv relief.

Pittsburgh, C. C. & St. L. Ry. Co. v. *Town of Croth ersville*, 159 Ind. 330 (1902).

City of Louisville v. *Louisville Home Telephone Co.*, 279 Fed. 949, 960 (1922).

Baker v. *City of Grand Rapids*, 142 Mich. 687 (1906).

Jose v. *Utley*, 185 Cal. 656 (1921).

Slovanian Association v. *City of Portland*, 111 Ore. 335 (1924).

Village of Cedar Springs v. *Schlick*, 81 Mich. 405 (1890).

ARGUMENT.

I.

ORDINANCE 1945 IS NOT UNCONSTITUTIONAL AS VIOLATIVE OF THE FOURTEENTH AMENDMENT OR OF THE CONSTITUTION OF THE STATE OF INDIANA.

A.

ORDINANCE 1945 IS NOT IN CONFLICT WITH ANY PROVISION OF THE CONSTITUTION OF THE STATE OF INDIANA.

A page will suffice to demonstrate that the ordinance violates no prohibition of the Indiana constitution. That constitution contains no prohibition similar to the limitations placed upon governmental action by the due process or equal protection clauses of the fourteenth amendment. The only section in the Indiana constitution upon which either the circuit court or respondent could attempt to rely would be the privilege and immunities provision. Indiana constitution, section 23, article I (appendix, 105). The supreme court of the state has expressly determined that the provisions of this section do not apply to a non-resident of Indiana. In *Sears* v. *Board of Commissioners of Warren County*, 36 Ind. 267 (1871), the supreme court, after considering and quoting this section of the state constitution, concluded, p. 280:

> "The above quoted section from our State constitution can have no application to non-residents of the State. The word citizen as used in said section has exclusive reference to citizens of this State, and not to citizens of other states who are doing business in this State."

A fortiori, this section has no application to a foreign corporation. Respondent in this case is an Illinois corporation, not an Indiana corporation. (R. 2). The finding of the

circuit court that respondent is an Indiana corporation is wholly at variance with the undisputed fact. (R. 2).

Again, the state supreme court has held that this constitutional provision cannot be relied upon to defeat the power of a municipal agency to limit the uses which may be made of its streets by a public utility.

State v. *Stickelman*, 182 Ind. 102, (1914).

Farmers & Merchants' Co-operative Telephone Company v. *Boswell Telephone Company*, 187 Ind. 371, (1918).

The circuit court appears to have taken the position that ordinance 1945 as applied to respondent is violative of the constitution of Indiana. Such a view entirely disregards the interpretation of the Indiana constitution by the supreme court of the state, and on this point the court was obviously in error.

B.

ORDINANCE 1945 IS NOT IN CONFLICT WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

It is also quickly evident that ordinance 1945 is not invalid as an act in violation of the due process clause of the fourteenth amendment. Decisions, uniform in this court and numerous state supreme courts, establish this proposition. A person has no property right in the highways of the state. One engaged in the conduct of his busniess on the highways without obtaining a franchise so to do has no property right to continue such business. Such use of the highways is a privilege and (disregarding for the moment the questions presented in connection with an interstate carrier) such use may be exercised only to the extent and in the manner allowed by the state or its authorized agent. It may be wholly prohibited by the state or its agent without any infringement upon the due process clause of the fourteenth amendment.

In *Packard* v. *Banton,* 264 U. S. 140 (1923) this court, in considering the effect of the fourteenth amendment on statutes governing motor vehicle public carriers, said p. 144:

> "If the State determines that the use of streets for private purposes in the usual and ordinary manner shall be preferred over their use by common carriers for hire, there is nothing in the Fourteenth Amendment to prevent. The streets belong to the public and are primarily for the use of the public in the ordinary way. Their use for the purposes of gain is special and extraordinary and, generally at least, may be prohibited or conditioned as the legislature deems proper."

In the leading case of *Greene* v. *City of San Antonio,* 178 S. W. 6 (Texas Civ. App.—1915), the court said, p. 7:

> "No individual has the inherent right to use a street or highway for business purposes. No man has the right to use a street for the prosecution of his private business, and his use for that purpose may be prohibited or regulated as the state or municipality may deem best for the public good."

In *Memphis* v. *State ex rel. Ryals,* 133 Tenn. 83, (1915), the court said, p. 97:

> "It is too clear for extended discussion that it was competent for the legislature under the police power to regulate the use of the streets and public places by jitney operators, who, as common carriers, have no vested right to use the same without complying with a requirement as to obtaining a permit or license. The right to make such use is a franchise, to be withheld or granted as the legislature may see fit."

In *Lane* v. *Whitaker,* 275 Fed. 476 (1921), the court said, p. 480:

> "The right, common to all, to the use of highways, is the ordinary use made thereof; but where, for private gain, a jitney owner wants a special and extraordinary benefit from the highway, to use it for such commercial purpose, the Legislature may, in the exercise of its police powers, wholly deny such use or it may permit it to some and deny it to others, and this is because of the extraordinary nature of such use."

In the recent decision of *Peoples Transit Company* v. *Henshaw,* 20 F. (2d) 87 (1927) the United States circuit court of appeals, eighth circuit, upheld a city ordinance permitting busses operated as a part of a local street railway system to operate on certain streets, but excluding other common carrier motor vehicles. Circuit Judge Stone said, p. 89:

> "There is no vested right in the use of streets. The Legislature may deny, grant or condition such use, or delegate such powers to the municipalities. This is the law under the Constitution of Oklahoma, as decided by the Criminal Court of Appeals of that state in *McGuire* v. *Wilkerson,* 209 P. 445, 448, and is the general rule. *Packard* v. *Banton,* 264 U. S. 140, 144, 44 S. Ct. 257, 68 L. Ed. 596. We have no doubt of the validity of the 1925 act, even as above construed."

In *Desser* v. *City of Wichita,* 96 Kans. 820, (1915), the court thus stated, pp. 823-4:

> "Modern requirements for municipal transportation render it essential that the power to regulate by the governing body be broad * * *.
>
> "Whatever natural right a citizen may have to traverse the streets of his city with a motor vehicle for the conveyance of his family or his friends, no inherent right exists to devote his vehicle to the public use of carrying passengers for hire and to appropriate to himself the use of all the streets for purposes of profit."

In *Schultz* v. *City of Duluth,* 163 Minn. 65 (1925), the court said, p. 68:

> "To do business upon public streets is not a matter of right, like the right of ordinary travel. Nor is the right to carry on such a business to be placed upon the same basis as that of conducting a lawful occupation upon private property within a municipality. The use of public streets for private enterprise may be for the public good, but, even so, it is a privilege that may be granted, regulated or withheld."

See also:

Denny v. *City of Muncie,* 197 Ind. 28 (1925).

Ex Parte Dickey, 76 W. Va. 576 (1915).
Schoenfeld v. *Seattle,* 265 Fed. 726 (1920).
Lutz v. *City of New Orleans,* 235 Fed. 978 (1916).

By ordinance 1945 petitioner did not assume to exercise this broad power of exclusion, which, under the decisions above referred to, clearly could be exercised by the state or its agent. Ordinance 1945 does not exclude any motor coach public carrier from passing over any street or parts of streets within the limits of petitioner city except one to four blocks in the most congested portion of the business section. All other streets of the city are open, subject only to the prohibition against using the same as waiting rooms and loading places. The common council of petitioner has limited the manner of use in such respects as in its judgment will best serve to avoid traffic congestion upon the streets of petitioner and to remove dangers to persons using [illegible].

Regulations much more restrictive of the movement of public passenger vehicles over the streets, have been uniformly upheld by decisions of the highest courts of the states. In nearly every instance one of the objections urged against such legislative action was that it deprived the regulated carrier of property without due process of law. This argument has, however, been uniformly unavailing.

Thus, in *Pine Bluff* v. *Arkansas Traveler Bus Company,* 171 Ark. 727 (1926), a city ordinance upheld by the state supreme court required intercity motor bus common carriers to establish stations within the city and prohibited them from stopping on the streets of the city to take on or discharge passengers.

In *Dreyer* v. *City Council of Union City,* 134 Atl. 624 (N. J.—1926), the city, by an elaborate ordinance of thirty-three sections, regulated motor busses (apparently intercity busses only) and provided the times for such busses leaving and entering the city. The New Jersey supreme court sus-

tained the validity of this ordinance against claims of unconstitutionality.

In *Gill* v. *City of Dallas,* 209 S. W. 209 (Texas Civ. App.—1919), the ordinance excluded from "a wide, irregular circle around the heart of the business section" of Dallas, motor vehicles transporting passengers for hire in the kind of service usually given by a street railway. The constitutionality of the act was sustained.

In *Frick* v. *City of Gary,* 192 Ind. 76 (1921), the ordinance prohibited jitney busses from receiving or discharging passengers upon any part of five named streets. These streets were the only north and south streets in the central business section of the city or within three-quarters of a mile of a very large manufacturing plant employing 8,000 men. The act was upheld by the Indiana supreme court.

In *Denny* v. *City of Muncie,* 197 Ind. 28 (1925), the same court sustained the validity of a city ordinance making it unlawful to run or operate any jitney bus on any street upon which a street car line was operating.

In *City of San Antonio* v. *Fetzer,* 241 S. W. 1034 (Texas Civ. App.—1922), the Texas court held constitutional an ordinance confining the operations of jitney busses to comparatively few, and to the less-used, streets of the city of San Antonio.

In *Red Star Motor Drivers' Association* v. *City of Detroit,* 234 Mich. 398 (1926), the Michigan supreme court sustained an ordinance prohibiting jitneys from operating on the principal streets leading out from the business center of the city and through any of the parks and boulevards.

In *Fritz* v. *Presbrey,* 44 R. I. 207 (1922), a Providence ordinance prohibited operations of motor busses within a fixed area in the retail business district and prescribed a limited route or routes to be traveled within the city. The constitutionality of the ordinance was sustained in the highest court of the state.

In *Decker* v. *City of Wichita,* 109 Kans. 796 (1921), the Wichita ordinance involved prohibited motor vehicles carrying passengers for hire from taking on or discharging passengers in any street upon which street railways operated. This provision was held constitutional.

It is apparent, then, that there is no conflict between the ordinance before this court in the case at bar and the due process clause. Even where one has a property interest, his use of such property may, when necessary for the welfare, health and safety of the general public, be regulated within broad limits by the state or its agent. In such case, the due process clause serves to stake out the limits. If it were necessary to demonstrate the fact, we do not believe there would be any difficulty in convincing this court that the present ordinance, as applied to a property right, is within the limits of an allowed interference therewith. But no property right is here involved. And when one has not a vested right the due process clause has no application.

No one has any vested right to carry on his business upon the public highway. A carrier plying his trade upon the public highways has no property right so to do. A carrier using the public streets for his terminals and loading stations does not acquire any property right by reason of the fact that for a time public authorities did not restrain or regulate such use. Denial of such use at any time, absolute prohibition of such use, cannot therefore constitute a taking of property by the state. *A fortiori,* a regulation of such use is not subject to this constitutional objection. Any contention that ordinance 1945 is void as in violation of this provision of the fourteenth amendment must be dismissed.

C.

ORDINANCE 1945 IS NOT IN CONFLICT WITH THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The real question then is whether or not ordinance 1945 violates the equal protection clause of the fourteenth amendment. The circuit court seems to have decided that it did. This holding, petitioner insists, was error.

The decision of the circuit court proceeds without due regard to certain basic principles. The language of the court clearly indicates that the decision was reached because the court failed to agree with the municipal legislature as to the method of dealing with its traffic congestion problem, and because the court took the position that petitioner had not established by sufficient evidence the necessity of the regulation.

Assuming for the moment that the classification selected by the city in this case could be considered one of questionable constitutionality, it will at once be perceived that the approach by which the circuit court attacked the question necessarily pushed over the line of exclusion a legislative act which properly belonged within the boundary mark.

In dealing with this controversy, the circuit court has wholly overlooked the fundamental and long established principles of law which safeguard the state or its municipal agency against unwarranted judicial interference with the exercise of legislative functions. It has approached the problem by placing upon petitioner the burden of establishing the validity of the classification provided for by the ordinance. In its opinion the circuit court said:

> "We are of opinion that the record does not show any valid reason for the passage of such an ordinance because of the congestion in the streets."

This language of the opinion indisputably shows that the circuit court usurped the legislative power to decide whether

this ordinance was wise legislation, and that it refused to uphold the ordinance because it was not convinced that the regulation was necessary.

This erroneous method of approach has led to an error in result. The ordinance has been declared invalid because petitioner failed to convince the court of its validity. The court has simply reversed the proper rule. The burden of establishing the invalidity of the ordinance properly rests upon the person attacking it. This rule is fundamental and essential to the preservation of legislative independence. Disregard of the rule in a court decision is particularly dangerous when surrounded by such sweeping language as is found throughout the circuit court's opinion. If the language of that court is here approved, then municipalities, and even states, will be left powerless to protect their streets or provide for the use thereof in such manner as will best meet the public needs.

Certain essential principles must always be kept in mind in applying constitutional restrictions to an ordinance assailed. To these the circuit court has failed to adhere.

In the first place, the equal protection clause of the fourteenth amendment does not take away from the state or its municipal agent the power to classify objects of legislation, but admits of the exercise of a wide scope of discretion in that regard, and affects what is done only when it is without any reasonable basis and is purely arbitrary. When classification made by the state or its agent is called into question, if any set of facts can reasonably be conceived that would sustain it, the act will be sustained. A classification to be obnoxious must be wholly arbitrary and destitute of reasonable basis.

> *Lindsley* v. *Natural Carbonic Gas Company*, 220 U. S. 61, 78 (1910).

In passing upon the constitutionality of a building zone ordinance, this court has at the last term restated the fore-

going principle. In *Village of Euclid, Ohio* v. *Ambler Realty Co.*, 47 Sup. Ct. 114 (1926) this court said, pp. 118-9:

> "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.
>
> "• • • In the light of these considerations, we are not prepared to say that the end in view was not sufficient to justify the general rule of the ordinance, although some industries of an innocent character might fall within the proscribed class. It cannot be said that the ordinance in this respect 'passes the bounds of reason and assumes the character of a merely arbitrary fiat.' *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 204, 33 S. Ct. 44, 47 (57 L. Ed. 184)."

In *Rast* v. *Van Deman & Lewis Company*, 240 U. S. 342 (1915), this court said, p. 357:

> "It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78. It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety."

In *Mutual Loan Co.* v. *Martell*, 222 U. S. 225, 235 (1911), this court said:

> "We have declared so often the wide range of discretion which the legislature possesses in classifying the objects of its legislation that we may be excused from a citation of the cases. We shall only repeat that the classification need not be scientific nor logically appropriate, and if not palpably arbitrary and is uniform within the class, it is within such discretion."

In the second place, mathematical nicety in classification is not an essential to the legality of an act. It suffices if the classification is practical. Classification is not reviewable unless palpably arbitrary, nor is the fourteenth amendment an excuse for courts' invading the legislative province. Un-

less there can be no fair reason for the attempted classification, the courts cannot set aside the act. Within wide limits the field of choice as to who shall come within the field of regulation is to be settled by the legislative agency.

In *Radice* v. *New York*, 264 U. S. 292 (1923), this court pointed out, p. 294:

> "Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker."

In *Jeffrey Manufacturing Company* v. *Blagg*, 235 U. S. 571, 576-7 (1914), this court said:

> "This court has many times affirmed the general proposition that it is not the purpose of the Fourteenth Amendment in the equal protection clause to take from the States the right and power to classify the subjects of legislation. It is only when such attempted classification is arbitrary and unreasonable that the court can declare it beyond the legislative authority. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78, and previous cases in this court cited on page 79. That a law may work hardship and inequality is not enough. Many valid laws from the generality of their application necessarily do that, and the legislature must be allowed a wide field of choice in determining the subject-matter of its laws, what shall come within them, and what shall be excluded."

In *Barrett* v. *Indiana*, 229 U. S. 26, 29-30 (1912), this court said:

> "The equal protection of the laws requires laws of like application to all similarly situated, but in selecting some classes and leaving out others the legislature, while it keeps within this principle, is, and may be, allowed wide discretion. It is the province of the legislature to make the laws and of the courts to enforce them. This court has had such frequent occasion to consider

this matter that extended discussion is not necessary now. The legislature is permitted to make a reasonable classification and before a court can interfere with the exercise of its judgment it must be able to say 'that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.' "

In *Missouri, Kansas and Texas Railway Company* v. *May,* 194 U. S. 267 (1903), these principles are thus succinctly stated, p. 269:

"It is admitted also that legislation may be directed against a class when any fair ground for the discrimination exists. But it is said that this particular subjection of railroad companies to a liability not imposed on other owners of land on which Johnson grass may grow, is so arbitrary as to amount to a denial of the equal protection of the laws. There is no dispute about general principles. The question is whether this case lies on one side or the other of a line which has to be worked out between cases differing only in degree. With regard to the manner in which such a question should be approached, it is obvious that the legislature is the only judge of the policy of a proposed discrimination. The principle is similar to that which is established with regard to a decision of Congress that certain means are necessary and proper to carry out one of its express powers. *McCulloch* v. *Maryland,* 4 Wheat. 316. When a state legislature has declared that in its opinion policy requires a certain measure, its action should not be disturbed by the courts under the Fourteenth Amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom its leaves untouched."

And in *Keokee Coke Co.* v. *Taylor,* 234 U. S. 224, 227 (1913) it is said:

"It is more pressed that the act discriminates unconstitutionally against certain classes. But while there are differences of opinion as to the degree and kind of discrimination permitted by the Fourteenth Amendment, it is established by repeated decisions that a statute aimed at what is deemed an evil, and hitting it presum-

ably where experience shows it to be most felt, is not
be upset by thinking up and enumerating other instanc
to which it might have been applied equally well, so f
as the court can see. That is for the legislature to jud
unless the case is very clear. *Lindsley* v. *Natural Ca*
bonic Gas Co., 220 U. S. 61, 81. *Central Lumber Co.*
South Dakota, 226 U. S. 157, 160. *Patsone* v. *Penns*
vania, 232 U. S. 138, 144. The suggestion that othe
besides mining and manufacturing companies may ke
shops and pay their workmen with orders on themselv
for merchandise is not enough to overthrow a law th
must be presumed to be deemed by the legislature e
extensive with the practical need."

See also:

Manigault v. *Springs*, 199 U. S. 473, 480-1 (1905).

Thirdly, it is incumbent on one who complains against le
islative classification to show clearly that it is unreasonab
and essentially arbitrary. The presumption is always
favor of the validity of legislation.

Thus, in *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.
61 (1910), *supra*, this court said pp. 78-9:

"One who assails the classification in such a law mu
carry the burden of showing that it does not rest up
any reasonable basis, but is essentially arbitrary."

In *Middleton* v. *Texas Power & Light Company*, 249 U.
152, (1918), this court further asserted, p. 157:

"There is a strong presumption that a legislature u
derstands and correctly appreciates the needs of its ow
people, that its laws are directed to the problems ma
manifest by experience, and that its discriminations a
based upon adequate grounds."

In one of the recent zoning cases, *Zahn* v. *Board of Publ*
Works of City of Los Angeles, 47 Sup. Ct. 594 (1926), th
court in upholding a zoning ordinance said, p. 595:

"The common council of the city, upon these a
other facts, concluded that the public welfare would

promoted by constituting the area, including the property of plaintiffs in error, a zone 'B' district, and it is impossible for us to say that their conclusion in that respect was clearly arbitrary and unreasonable. The most that can be said is that whether that determination was an unreasonable, arbitrary, or unequal exercise of power is fairly debatable. In such circumstances, the settled rule of this court is that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibilty of determining the question."

And the United States circuit court of appeals, seventh circuit, has thus interpreted this principle, *Canada Atlantic Transit Company* v. *City of Chicago,* 210 Fed. 7, 11 (1913):

"Their challenge of the ordinance for unreasonableness imposes upon the appellants the most difficult burden of proof established for any issue, in law or equity."

The constitutionality of ordinance 1945 must be determined, not as an abstract question, but in the light of the actual conditions and problems existing in Hammond. Those conditions and problems have been carefully pointed out, *supra* 3-9. The attention of the court has also been called to the fact that each of the first two sections of the ordinance provides a separate and distinct regulation. Each of these sections must be separately analyzed and considered. Furthermore the constitutionality of this ordinance as applied to respondent must be considered with reference wholly to the streets over which respondent insists upon operating. The reasonableness of the ordinance's provisions as applied to *those* streets is the sole question here in issue. Respondent insists upon its power to operate without restriction over the most congested and busy streets of the city. It insists on its right to traverse across the very central point of the downtown traffic congestion. Practically the entire routes over which the respondent insists on running are upon streets on which street car lines are operating (R. 3, 6, 62

[map]). The question here is not the theoretical reasonableness or unreasonableness of ordinance 1945 as applied to some conjectured situation. It is the question whether ordinance 1945 as applied to the operations of respondent constitutes an unreasonable regulation.

The reasonableness of an ordinance controlling the use of streets can only be intelligently decided after these conditions and facts have been fully weighed. This basic principle has been thus admirably stated by this court in the recent decision upholding the principle of city zoning. In *Village of Euclid, Ohio* v. *Ambler Realty Company,* 47 Sup. Ct. 114 (1926), *supra,* Mr. Justice Sutherland said, p. 118:

> "Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for, while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise."

There is, of course, no categorical test for proper classification. One decision is seldom, if ever, absolutely controlling in reaching a decision in another case. Varying circumstances peculiar to each situation make it necessary for the court to analyze anew each problem presented. Prior de-

cisions do, however, form a guide and index to the irregular and ofttimes indeterminate boundary line which marks the limit of constitutional classification.

Before proceeding to examine such classifications as may be helpful to the court in the case at bar, it is worth while to consider the distinguishing characteristics between the common carriers included and those excluded from the operation of the present ordinance.

The municipal legislature was confronted with the problem of serious traffic congestion. The situation was one growing out of an industrial center located against the boundary line of the second largest city in the United States. Obviously this fact alone would assure heavily burdened streets. The condition, however, was particularly aggravated by five main line railroads operating at grade and converging practically at the heart of the business district of the city. Not many months prior to the enactment of ordinance 1945 the city had suffered the experience of having thrown into this congestion an innumerable number of jitneys. The city authorities had recognized the need of the elimination of these numerous carriers throughout the congested portions of the city, but had also realized the necessity of supplying to its own inhabitants a regular and certain city-wide form of local transportation. This problem was met in the most practical way by granting a franchise for local common carrier motor coach service.

The circuit court of appeals assumed the fact, which will hereafter be clearly established, that the city had the exclusive power to provide for this local service. (*infra* 76-89). Granting this fact, the sole question in regard to classification is whether a classification permitting rights in the use of the streets to a franchised company furnishing local transportation and denying similar rights to strictly intercity and interstate common carrier motor coach operators is proper classification in a police measure designed for the protection, safety and general convenience of the municipal inhabitants.

In effect the city authorities said this:

> "We shall allow the streets of the city to be used without restriction by carriers whom we franchise to give local service. This will allow necessary local transportation between all parts of the city. We shall, however, diminish congestion and procure greater safety on the highways by doing two things:
>
> "*a.* Eliminating from parts of certain streets extending from one to four blocks each way from the central point of the congested downtown business district, motor busses operated by common carriers legally authorized to to carry inter-city passengers only; and
>
> "*b.* Requiring common carriers, not authorized to give local service, to proceed directly to a terminal or terminals within the city rather than permitting them to use the street corners for loading zones and waiting stations, thereby continually weaving in and out of traffic, adding to the delay on, and endangering the use of, the highways.
>
> "The inhabitants of the city must have transportation to and from their homes and places of business. The outside traveler to the city will not be greatly inconvenienced by being compelled to travel to such stations as the interstate and intercity carrier may maintain. Any inconvenience which he may suffer is necessary in order to adjust fairly for the general public benefit the uses of the highways of the city."

Certainly even respondent would not contend that the municipal authorities, in regulating the use of the streets, in protecting the general public in its uses of the streets, and in determining the proper adjustments necessary in order that overburdened highways may most nearly serve the public convenience and best provide proper avenues for traffic, cannot classify between common carriers by motor vehicle and other motor vehicle users, or that an exclusion of the former from the use or certain manner of use of the streets cannot be effected without a like exclusion or regulation of the latter. Such classifications have repeatedly been sustained. Likewise classification between different types of common car-

riers has been often upheld. In regulations governing the use of the streets, the courts have repeatedly recognized that restrictions upon jitney operations may be made without similar restrictions upon street railway systems. Classification between street railway common carriers and motor vehicle common carriers has been repeatedly upheld. And in such regulations, classification between jitneys and motor busses; between taxicabs and motor busses or jitneys; between motor busses doing a local business and those doing only an intercity business; and between motor busses operated as a part of a street railway system and other motor busses independently operated, has been sustained.

Thus, in *Packard* v. *Banton,* 264 U. S. 140 (1923), *supra,* the regulatory measure attacked applied only to taxicabs and expressly excluded street cars and omnibusses. This court sustained the classification.

In *Peoples Transit Company* v. *Henshaw,* (U. S. Daily, June 10, 1927, p 11), *supra,* the regulatory ordinance upheld by the court prohibited on the first two streets on either side of a street on which a street car line was located, operation of motor busses doing a local business, but allowed operation on such streets by motor busses doing an intercity business and by motor busses doing a local business but operated by the street railway.

In *Frick* v. *City of Gary,* 192 Ind. 76 (1922), *supra,* the regulations affected only jitneys, defined as motor vehicles having a capacity of nine passengers or less used for transporting passengers for hire, and, further, excluded taxicabs, hotel busses and railroad busses from the prohibitons of the ordinance.

In *Denny* v. *City of Muncie,* 197 Ind. 28 (1925), *supra,* the regulation applied only to jitneys.

The ordinances involved in *City of San Antonio* v. *Fetzer,* 241 S. W. 1034 (Texas Civ. App.—1922), *supra* and *Red Star*

Motor Drivers' Association v. *City of Detroit,* 234 Mich. 398 (1926), *supra,* affected only jitneys.

A regulatory ordinance attacked in *In re Cardinal,* 170 Cal. 519 (1915), applied only to "jitney busses" and did not include other motor busses, even though used for the carriage of passengers for hire.

In *Decker* v. *City of Wichita,* 109 Kans. 796 (1921), *supra,* the ordinance prohibited motor vehicles carrying passengers for hire from taking on or discharging passengers on certain streets upon which street cars were permitted to make such stops.

In *Allen* v. *City of Bellingham,* 95 Wash. 12 (1917), the ordinance regulated only jitneys or motor busses operating in local business, and excluded other carriers such as autostages, intercity busses, taxicabs and street cars.

In *Memphis Street Railway* v. *Rapid Transit Company,* 133 Tenn. 99 (1915), the statute provided for the regulation of jitneys in their use of the streets, but did not include street railways or taxicabs.

In *Gill* v. *City of Dallas,* 209 S. W. 209 (Texas Civ. App.–1919), *supra,* a regulatory ordinance affected only motor vehicles transporting passengers for hire in the kind of service usually given by a street railway.

In *Pine Bluff* v. *Arkansas Traveler Bus Company,* 171 Ark. 727 (1926), *supra,* the regulatory ordinance applied only to intercity motor busses operating for hire.

It is true that the classification made by the city under ordinance 1945 is a classification between two groups of common carriers by motor coach, but the carriers in each class have a different function to perform in the transportation field, and it is inconceivable that anything in the fourteenth amendment should be held so to limit the power of a municipal agency that it could not put any restrictions on the use of its streets by intercity and interstate carriers without de-

stroying the effectiveness of its local transportation system. Certainly no one would seriously contend that a regulation prohibiting steam and interurban railways from stopping every block within a city would deny such carrier equal protection of the laws if a street railway within the city were not brought within the prohibitions.

It is true that at the time of the enactment of the ordinance the franchised carrier, Calumet Motor Coach Company, was, in addition to its local transportation business, engaged in interstate transportation of passengers between Chicago and Hammond. It is also true that the busses so used, were at the same time used in giving a local transportation service to the north part of Hammond. These busses starting at the corner of State and Hohman streets passed through to the state line, the western boundary of the city, thus traversing a distance over the streets of Hammond of about six miles. In this distance, many local passengers were hauled. Except during peak periods, all the local service to this north territory was given by means of these busses. The right which the Calumet Motor Coach Company had to stop on the street to receive and discharge passengers was a right existing to it, not as an interstate carrier but as a carrier of local passengers. If section 2 of the ordinance had prevented the franchised carrier, while passing over this route, from stopping to receive and discharge passengers, it would have been unfair to the people of Hammond living in the north part of the city.

Classifications far nearer the line of arbitrary action, classifications in which the excluded group, considering the ill to be cured, was a more similar to the included group, have been repeatedly upheld.

Peoples Transit Company v. *Henshaw,* 20 F. (2d) 87 (1927), has already been referred to. In that case Oklahoma City enacted an ordinance prohibiting the operation by independent operators of a local motor bus business

on the first two streets on either side of a street car line. The ordinance expressly permitted the street car company to operate on these streets busses giving a local service. Intercity busses were also allowed to operate on these streets. The United States circuit court of appeals, eighth circuit, upheld the classification. That court, after discussing the differences between the excluded class and those permitted to use the streets under the terms of the ordinance, said p. 89:

> "* * * all differences are not unreasonable and, therefore, illegal discriminations. In legislating for the public welfare, legislative bodies (in this case the city council) may, usually do, and should base their action upon actual conditions as they exist. It is to such conditions that the legislation will apply and it is such that will be affected thereby. Therefore, the matter of discrimination must be determined by an understanding of those conditions and of the effect designed or to be expected thereon from the legislation. If the difference is based upon a conception of the public welfare which finds reasonable basis in the existing conditions, it is not an illegal discrimination—otherwise, it is. The controlling factor is the welfare of the public affected."

In *New York, New Haven and Hartford Railroad Company* v. *New York,* 165 U. S. 628 (1896), a state statute made it unlawful for any railroad to heat its passenger cars on other than mixed trains by any stove or furnace kept inside the car. The act contained a proviso that it should not apply to railroads less than fifty miles in length. The court denied that this constituted improper classification. This court upheld the statute and said, p. 634:

> "In any event, there is no such discrimination against companies having more than fifty miles of road as to justify the contention that there has been a denial to the companies named in the act of the equal protection of the laws. The statute is uniform in its operation upon all railroad companies doing business in the State of the class to which it is made applicable."

Erb v. *Morasch,* 177 U. S. 584 (1899), involved an ordinance limiting the running of railroad trains through Kansas City at a speed greater than six miles an hour. The ordinance provided that it should not apply to the Interstate Rapid Transit Railway Company, a line serving locally Kansas City, Missouri and Kansas City, Kansas. This court upheld the classification and said, pp. 586-7:

> "With the presumption always in favor of the validity of legislation, state or municipal, if the ordinance stood by itself the courts would be compelled to presume that the different circumstances surrounding the tracks of the respective railroads were such as to justify a different rule in respect to the speed of their trains.
>
> "But in this case we are not left to any mere matter of presumption. The testimony discloses that the Interstate Rapid Transit Railroad is simply a street railroad connecting the cities of Kansas City, Missouri, and Kansas City, Kansas, operated at the time of the passage of the ordinance by steam power, but with that power used only in dummy engines, and, at the time of the accident involved in this case, by electricity. It is true that there is testimony that at or near the place where the accident happened parties thought the operation of the street railroad was more dangerous than the operation of the railroad of which the plaintiff in error was receiver, but the validity of such an ordinance is not determinable by individual judgments. It is not a question to be settled by the opinions of witnesses and the verdict of a jury upon the question whether one railroad in its operation is more dangerous than another. All that is necesary to uphold the ordinance is that there is a difference, and that existing it is for the city council to determine whether separate regulations shall be applied to the two."

Barrett v. *Indiana,* 229 U. S. 26 (1912), *supra,* involved an Indiana statute classifying for the purpose of safety regulations between bituminous coal mines and block coal mines. It appears that in the latter, mining was at a distance of about ninety feet from the surface, and that in the former

the depth was considerably greater. This court sustained the classification and said, pp. 29-30:

> "The equal protection of the laws requires laws of like application to all similarly situated, but in selecting some classes and leaving out others the legislature, while it keeps within this principle, is, and may be, allowed wide discretion. It is the province of the legislature to to make the laws and of the courts to enforce them. This court has had such frequent occasion to consider this matter that extended discussion is not necessary now. The legislature is permitted to make a reasonable classification and before a court can interfere with the exercise of its judgment it must be able to say 'that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.' "

Atlantic Coast Line Railroad Company v. *State of Georgia*, 234 U. S. 280 (1913), involved a Georgia statute requiring railroads to use a 300 watt electric headlight. The act contained a proviso to the effect that it should not apply to tram roads, mill roads and lumber or logging roads. This classification was sustained, the court saying, p. 289:

> "As to the exceptions made by the statute of tram roads, mill roads, etc. it is impossible to say that the differences with respect to operation and traffic conditions did not present a reasonable basis for classification."

In *Armour & Company* v. *State of North Dakota*, 240 U. S. 510 (1915), it was urged that the state statute requiring that lard be sold in a certain type of container, arbitrarily and without reasonable ground singled out lard from all other food products sold in packages, such as butter. This court, in denying this position, said p. 517:

> "The power may be determined by degrees of evil or exercised in cases where detriment is specially experienced."

St. Louis, Iron Mountain & Southern Railway Company v. *State of Arkansas*, 240 U. S. 518 (1915), involved a statute

requiring full switching crews on railroads but exempting from the statute railroads operating lines less than one hundred miles in length. This court refused to find that the classification was arbitrary and unconstitutional. It said, p. 521:

> "The distinction seems arbitrary if we regard only its letter, but there may have been considerations which determined it, *and the record does not show the contrary.* We have recognized the impossibility of legislation being all-comprehensive and that there may be practical groupings of objects which will as a whole fairly present a class of itself, although there may be exceptions in which the evil aimed at is deemed not so flagrant."

In *Dominion Hotel, Incorporated* v. *State of Arizona,* 249 U. S. 265 (1918), this court passed upon a statute restricting the hours of labor of women in hotels and restaurants, but exempting from the restrictions railroad restaurants or eating houses located upon railroad right of ways and operated by or under contract with any railroad company. This classification was sustained and this court, speaking through Mr. Justice Holmes, said, pp. 268-9:

> "The Fourteenth Amendment is not a pedagogical requirement of the impracticable. The equal protection of the laws does not mean that all occupations that are called by the same name must be treated in the same way. The power of the State 'may be determined by degrees of evil or exercised in cases where detriment is specially experienced.' *Armour & Co.* v. *North Dakota,* 240 U. S. 510, 517. It may do what it can to prevent what is deemed an evil and stop short of those cases in which the harm to the few concerned is thought less important than the harm to the public that would ensue if the rule laid down were made mathematically exact. The only question is whether we can say on our judicial knowledge that the legislature of Arizona could not have had any reasonable ground for believing that there were such public considerations for the distinction made by the present law. The deference due to the judgment of the legislature on the matter has been emphasized again and again. *Hebe Co.* v. *Shaw,* 248

U. S. 297, 303. Of course, this is especially true when local conditions may affect the answer, conditions that the legislature does but that we cannot know. *Cusack Co.* v. *Chicago,* 242 U. S. 526, 530, 531.

"Presumably, or at least possibly, the main custom of restaurants upon railroad rights of way comes from the passengers upon trains that stop to allow them to eat. The work must be adjusted to the hours of the trains. This fact makes a practical and, it may be, an important distinction between such restaurants and others. If in its theory the distinction is justifiable, as for all that we know it is, the fact that some cases, including the plaintiff's, are very near to the line makes it none the worse. That is the inevitable result of drawing a line where the distinctions are distinctions of degree; and the constant business of the law is to draw such lines. 'Upholding the act as embodying a principle generally fair and doing as nearly equal justice as can be expected seems to import that if a particular case of hardship arises under it in its natural and ordinary application, that hardship must be borne as one of the imperfections of human things.' "

These decisions necessarily clear away any first blush impression that ordinance 1945 is obnoxious to the fourteenth amendment because of arbitrary classification. This court will not be misled by the fact that *franchised local* carriers excluded from the provisions of the ordinance and those carriers included within the terms of the ordinance are both operating motor coaches. It is indeed a specious argument to urge that since both are hauling people for hire there can be no classification between them. The service which each gives, at least the operations of each lawfully conducted, is an entirely different service. In that is the basis of classification and the distinguishing characteristics which make the classification legal. The franchised carrier is the carrier authorized to furnish the local transportation. The people served by that carrier are those traveling daily between their homes within petitioner city and the business or factory centers of this city. They are the people living

within petitioner city and to whom the authorities of the city owe an obligation to provide an adequate, flexible, convenient, local transportation. On the other hand, respondent, or any other non-franchised carrier, comes into the city unauthorized to give such local service and are neither under any obligation to give such service nor are permitted to give it without first securing a franchise from the city. Respondent, and all similarly situated, bring in the transients from the outside or take out residents of petitioner upon occasional trips. Respondent's operations fall in the class with interurban operations of steam or electric lines. Surely, in an endeavor to obtain a maximum of benefit for all in the use of overburdened streets, the city can regulate as a class strictly interurban carriers without being compelled thereby to put like restrictions upon its local transportation system. It may well be that the greatest fairness to all in the use of the highways will be attained by limiting the interurban carrier in the manner provided by ordinance 1945. At the same time, it may be, and probably is, true that to regulate in the same manner the local transportation agency would be to impose a restriction which, instead of serving would be detrimental to the general welfare of petitioner city. We think that it is clear that the position of the circuit court that ordinance 1945 was void as in violation of the equal protection clause of the fourteenth amendment cannot be sustained.

II.

ORDINANCE 1945 IS NOT INVALID AS UNDULY INTERFERING WITH THE INTERSTATE MOTOR COACH OPERATIONS OF RESPONDENT.

One of the three motor coach lines which respondent operates carries only passengers travelling interstate; another one carries both interstate and intra-state passengers. In the district court, and again on appeal to the circuit court of appeals, respondent attacked ordinance 1945 as an attempt

to control and burden interstate commerce. To sustain this position, respondent relied almost wholly upon *Buck* v. *Kuykendall*, 267 U. S. 307 (1924), and *Bush Co.* v. *Malloy*, 267 U. S. 317 (1924). Respondent erroneously interpreted the holdings of this court in those cases as taking the position that the use made of the highways of the state by an interstate carrier is not subject to regulation by the state or its municipal agent. Respondent has insisted that under those decisions both the state and the municipality have been deprived of the right to regulate the manner of use of the streets of the municipality by a carrier operating in interstate commerce.

Respondent's attempt to invalidate ordinance 1945 by these decisions is an endeavor to distort beyond all recognition the principles there involved. Since the date of those decisions, interstate carriers, seeking to use the highways of the states without any restriction, have repeatedly attempted to expand and misconstrue the scope of the court's holding. Counsel in this case, as is generally the practice, has insisted that this court by those decisions has given to interstate operators a *carte blanche* to the use of all streets and highways; that interstate motor coach carriers are free to ply their trade upon the public highways in such manner as they will; and that the practical result of the *Buck* and *Bush* decisions is to prevent the effective control by the state or its agency of the manner of use of the streets by an interstate carrier.

The *Buck* and *Bush* decisions are too recent to require extended discussion in this court. Neither of these cases denies the power of the state to control and regulate the manner of use which may be made of its highways for the private business of interstate common carrier service. Clearly, neither of these cases denies to the state the right to regulate and control, as local needs demand, congestion upon the state

highways. In each of these cases the state authority asserted a power to determine when interstate commerce was needed, —in other words, to control and regulate the commerce itself. The thing which this court condemned was not a right of the state to put reasonable limitations upon the manner of use of its streets for private business or reasonably to regulate and restrict the use of those highways so they would best serve the public needs. The thing condemned was the attempt by the state to determine whether there was a demand for interstate transportation service.

The distinction is not a mere formal one. There is a vital difference between an attempt by a state to say who may engage in interstate common carrier service and an attempt to define the manner in which those engaged in interstate common carrier service may use the state highways in their private business. The former is simply outside the province of the state. It is a matter exclusively within the power of the federal government. The latter, at least until congress acts, is primarily within the control and power of the state.

Since the decision of the circuit court of appeals in the case at bar, and since the filing of briefs in this court, this court has had occasion to pass upon several appeals involving state regulations touching motor vehicles operating interstate: *Clark* v. *Poor*, 47 Sup. Ct. 702 (1926) passing on state regulations and fees enforced against interstate carriers; *Morris* v. *Duby*, 47 Sup. Ct. 548 (1926), upholding as applied to interstate carriers limitations as to weight of trucks; *Hess* v. *Pawloski*, 47 Sup. Ct. 632 (1926), sustaining a state statute requiring a non-resident motorist to appoint a state official as his agent to accept process in proceedings growing out of use of highways by non-resident motorist. See also *Interstate Busses Corporation* v. *Holyoke Street Railway Company*, 273 U. S. 45 (1926).

In accord with the views expressed by this court in these recent cases are the late holdings of other federal courts and the Indiana supreme court.

Sprout v. *City of South Bend*, 198 Ind. 563 (1926).

Interstate Busses Corporation v. *Blodgett*, 19 F. (2d) 256 (1927).

American Transit Company v. *City of Philadelphia*, 18 F. (2d) 991 (1927).

These decisions clearly show the fallacy of the position taken by respondent as to the effect of the holding in the *Buck* and *Bush* cases. They recognize the broad regulatory powers possessed by the state or its agent in governing, regulating and controlling the use of its highways by motor vehicles operating in interstate commerce. These decisions wipe out the argument of counsel for respondent that ordinance 1945 cannot be applied to an interstate carrier. These recent decisions are not in conflict with the *Buck* and *Bush* decisions. They do, however, show the untenability of the interpretation placed upon those earlier decisions, by interstate motor vehicle operators, who sought to use them as a license given by the federal government authorizing the unrestrained, unregulated use of the streets and highways by interstate carriers.

It is, of course, unnecessary in this case to determine how broad and absolute, as applied to an interstate carrier, may be the power of the state to limit the use of its highways. This court is here concerned only with the effect of each of the two separate provisions of this particular ordinance. As has already been pointed out, ordinance 1945 does not attempt to control or *regulate* the commerce which passes over the streets of the city. It does not attempt to exclude such commerce. It does attempt to regulate, in a reasonable manner and for the purpose of making congested streets best serve the needs of the public as a whole, the use of the

city's streets by common carriers. It does not discriminate among interstate carriers, nor does it discriminate between interstate carriers and inter-city carriers. An interstate carrier who is not authorized to do a local business is treated exactly the same as an intrastate carrier who is unauthorized to do a local business. It does classify between carriers who are authorized to furnish local transportation on the one hand and all interurban carriers on the other.

In providing for general safety, convenience and welfare in the use of the over crowded streets, the municipal authorities deemed it necessary to prohibit motor bus carriers, not lawfully engaged in giving local transportation, from entering a limited area in the central business district, and from using certain streets of the city as loading zones for receiving and discharging passengers. The ordinance enacted for this purpose does not limit the right of the passage of interstate or inter-city busses over the streets of the city except to the very limited extent provided for by section 1. Such limitation surely cannot be held to be a direct burden on interstate commerce, for it only requires a slight detour as heretofore shown (*supra* 6-7). As an illustration, we might cite the interstate railroad cases where it has been held by this court that a state or municipality may require such railroads to stop at certain stations, to remove tracks from congested intersections, to construct viaducts, to elevate tracks, etc., not only in order to promote safety, but also to benefit the general convenience and welfare.

A long line of decisions by this court, reaching back to the very earliest cases involving the commerce clause of the constitution, settles beyond controversy the principle that one is not immune from police regulation by the state merely because he is engaged in interstate commerce.

In the case of *Buck* v. *Kuykendall*, 267 U. S. 307 (1924), *supra*, it is said, p. 315:

> "It may be assumed that Section 4 of the state statute is consistent with the Fourteenth Amendment; and also,

> that appropriate state regulations adopted primarily to promote safety upon the highways and conservation in their use are not obnoxious to the commerce clause, where the indirect burden imposed upon interstate commerce is not unreasonable."

In *Cooley* v. *Board of Wardens of Port of Philadelphia*, 12 How. 299 (1851), this court said, p. 319:

> "The mere grant of such a power to Congress did not imply a prohibition on the States to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the States, and that the States may legislate in the absence of Congressional regulations."

And in *Cleveland &c. Ry. Co.* v. *Illinois*, 177 U. S. 514 (1900), Mr. Justice Brown, speaking for this court, after reviewing a number of its decisions, said, pp. 516-7:

> "Few classes of cases have become more common of recent years than those wherein the police power of the State over the vehicles of interstate commerce has been drawn in question. That such power exists and will be enforced, notwithstanding the constitutional authority of Congress to regulate such commerce, is evident from the large number of cases in which we have sustained the validity of local laws designed to secure the safety and comfort of passengers, employes, persons crossing railway tracks, and adjacent property owners, as well as other regulations intended for the public good."

An interstate carrier is subject to the reasonable police regulations of the state until congress by its acts clearly appropriates the entire field of regulation. The regulation by congress to a limited extent, even, does not destroy state power. It is only where congress has deemed it necessary to take over the entire field that the state loses its right to act. In connection with interstate commerce by motor coaches, congress has not yet seen fit to pass any legislation whatsoever. In this situation the states are not powerless to protect and control the uses of their highways, nor is the interstate motor coach carrier free from all restrictions.

The governing principles are succinctly stated by this court in the *Minnesota Rate Cases*, 230 U. S. 352, 402 (1912):

> "But within these limitations there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the Government because of the necessity that they should not remain unregulated and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction but rather that the States should continue to supply the needed rules until Congress should decide to supersede them. * * * Our system of government is a practical adjustment by which the National authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the State appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power."

The decisions applying these principles and bearing most directly upon the question at bar are those resulting from a controversy between an interstate carrier and the state or its agency which is exercising the power of police regulation to promote safety or convenience in the use of the streets or other public facilities. These decisions show clearly the broad scope of state power. They likewise effectively answer the claim that the ordinance attacked in the case at bar is inhibited by the commerce clause of the federal constitution.

In *Clark* v. *Poor*, 47 Sup. Ct. 702 (1926), *supra*, this court stated, p. 703:

> "The highways are public property. Users of them, although engaged exclusively in interstate commerce, are subject to regulation by the state to ensure safety and convenience and the conservation of the highways."

And in *Interstate Busses Corporation* v. *Holyoke Street Railway Company*, 273 U. S. 45 (1926), *supra*, this court pointed out, p. 52:

> "Undoubtedly, the State has power in the public interest reasonably to control and regulate the use of its highways so long as it does not directly burden or interfere with interstate commerce. *Packard* v. *Banton*, 264 U. S. 140, 144; *Kane* v. *New Jersey*, 242 U. S. 160; *Hendrick* v. *Maryland*, 235 U. S. 610."

In *Kane* v. *New Jersey*, 242 U. S. 160 (1916) and *Hendrick* v. *Maryland*, 235 U. S. 610 (1914), this court upheld state statutes prohibiting the driving of automobiles into or through a city without having them licensed in the state. In the latter case this court said, p. 622:

> "In the absence of national legislation covering the subject a State may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles —those moving in interstate commerce as well as others. * * * This is but an exercise of the police power uniformly recognized as belonging to the States and essential to the preservation of the health, safety and comfort of their citizens; and it does not constitute a direct and material burden on interstate commerce."

In *Erie Railroad Company* v. *Board of Public Utility Commissioners*, 254 U. S. 394 (1920), the state agency in the exercise of its police regulatory powers undertook to compel the elevation or depression of fifteen grade crossings in the city of Patterson, New Jersey. The necessary cost exceeded $2,000,000. The company contended that the requirement was an unreasonable exercise of the state police power, imposing

an enormous burden without any real occasion or necessity; that the result would so impoverish the road as to impair seriously its ability to function in its interstate carriage; and that the ordinance resulted in the destruction of sidings and connections used in interstate commerce. This court held, however, that none of these considerations could be availed of to preclude the state from exercising its police regulatory power in determining the means necessary to guard public safety and convenience. This court said, pp. 410-1:

> "Being places to which the public is invited and that it necessarily frequents, *the State*, in the care of which this interest is and from which, ultimately, the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger. That is one of the most obvious cases of the police power, * * *. It is said that if the same requirement were made for the other grade crossings of the road it would soon be bankrupt. That the States might be so foolish as to kill a goose that lays golden eggs for them, has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil. *Denver & Rio Grande R. R. Co.* v. *Denver*, 250 U. S. 241, 246. To engage in interstate commerce the railroad must get on to the land and to get on to it must comply with the conditions imposed by the State for the safety of its citizens. * * * If the burdens imposed are so great that the road cannot be run at a profit it can stop, whatever the misfortunes the stopping may produce."

In *Denver & Rio Grande Railroad Company* v. *Denver*, 250 U. S. 241 (1919) the municipal authorities required the removal by an interstate carrier of certain trackage in the city of Denver connecting its own and other railroad yards. Less convenient means of reaching these yards remained available, but it was beyond dispute that the company would ex-

perience some disadvantages. This court affirmed a judgment of the state court sustaining the ordinance. It was said, p. 246:

> "The objection that the ordinance offends against the commerce clause of the Constitution is not tenable. The ordinance makes no discrimination against interstate commerce, will not impede its movement in regular course, and will affect it only incidentally and indirectly."

And in *South Covington & Cincinnati Street Railway Company* v. *City of Covington,* 235 U. S. 537 (1914), this court upheld as applied to an interstate carrier the act of the state agency limiting the number of persons per coach that could be carried, regulating the ventilation, cleaning and fumigating of cars, and the number of cars used. This court there said, p. 546:

> "In numerous instances this court has sustained local enactments, passed in the exercise of the police power of the State, in the interest of the public health and safety, notwithstanding the regulation may incidentally or indirectly affect interstate commerce. The subject was given much consideration in the *Minnesota Rate Cases,* 230 U. S. 352, and the previous cases dealing with this subject are therein collected and reviewed. In the light of these cases, and upon principle, the conclusion is reached that it is competent for the State to provide for local improvements or facilities, or to adopt reasonable measures in the interest of the health, safety and welfare of the people, notwithstanding such regulations might incidentally and indirectly involve interstate commerce. Summing up the matter, it is there stated, p. 402:
>
> > 'Our system of government is a practical adjustment by which the National authoritiy as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarily one of local concern, and from its nature belongs to the class with which the State appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Con-

> gress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. * * *'"

In *Escanaba Company* v. *Chicago*, 107 U. S. 678 (1882), this court sustained as against an interstate carrier by water an ordinance of the city of Chicago prohibiting the opening of bridges on the Chicago river during morning and evening rush hour periods and limiting the time of each opening at other periods to ten minutes. The company insisted that the enforcement of the ordinance incovenienced and delayed its service and that, when such service was interstate, the state agency could not thus burden or affect this service. This court thus clearly enunciates the governing rule, p. 683:

> "But the States have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience, and prosperity of their people. This power embraces the construction of roads, canals, and bridges, and the establishment of ferries, and it can generally be exercised more wisely by the States than by a distant authority. They are the first to see the importance of such means of internal communication, *and are more deeply concerned than others in their wise management.* Illinois is more immediately affected by the bridges over the Chicago River and its branches than any other State, and is more directly concerned for the prosperity of the city of Chicago, for the convenience and comfort of its inhabitants, and the growth of its commerce. And nowhere could the power to control the bridges in that city, their construction, form and strength, and the size of their draws, and the manner and times of using them, be better vested than with the State, or the authorities of the city upon whom it has devolved that duty."

In *Atlantic Coast Line Railroad Company* v. *State of Georgia*, 234 U. S. 280 (1913), *supra*, this court upheld a state statute regulating the type of headlight which must be used within the state on locomotives. It was there said, p. 292:

> "If there is a conflict in such local regulations, by which interstate commerce may be inconvenienced—if there appears to be need of standardization of safety appliances and of providing rules of operation which will govern the entire interstate road irrespective of state boundaries—there is a simple remedy; and it cannot be assumed that it will not be readily applied if there be real occasion for it. That remedy does not rest in a denial to the State, in the absence of conflicting Federal action, of its power to protect life and property within its borders, but it does lie in the exercise of the paramount authority of Congress in its control of interstate commerce to establish such regulations as in its judgment may be deemed appropriate and sufficient. Congress, when it pleases, may give the rule and make the standard to be observed on the interstate highway."

Thus, against the complaint of interstate carriers, this court has upheld state laws or municipal ordinances regulating its wharves, *Transportation Company* v. *Parkersburg*, 107 U. S. 691 (1882); providing rules of quarantine, *Morgans S. S. Co.* v. *Louisiana Board of Health*, 118 U. S. 455 (1885); regulating steam heating of cars, *New York, New Haven and Hartford Railroad Company* v. *New York*, 165 U. S. 628 (1896); requiring a certain number of trains to stop in villages of certain size, *Lake Shore, etc. Railway Co.* v. *Ohio*, 173 U. S. 285 (1898); prohibiting the movement of freight trains on Sunday, *Hennington* v. *Georgia*, 163 U. S. 299 (1895); controlling and regulating landing by river boats, *Packet Company* v. *Catlettsburg*, 105 U. S. 559 (1881).

Particularly important in a case involving the manner of use of city streets is the proper application of principles fixing the power of local regulation till congress sees fit to act. With the daily increase in the crowding of the highways, inability of local authorities to make such regulation

would necessarily be disastrous. In all rapidly growing communities, and especially in such communities adjacent to large centers of population, the problem of adjusting fairly and equitably the manner of using the streets is an essential and difficult one. Streets and avenues of a city and the other highways of a state are, of course, paths for interstate commerce. But those same streets and highways are primarily and fundamentally the nourishing and growth-giving factors of the local community. Interstate commerce has no right to use them in such manner as to prevent their performing this function. They have been principally built and are primarily sustained by the community or municipality. No other question is more essentially local than the one of determining in what manner the streets of a city may most beneficially serve all.

The burden which streets must carry, the functions which they must perform, and the manner in which they can most effectively and fairly serve all, is best known, and in the nature of things can only be best known, by the local authorities. To deny such authorities a wide scope of discretionary power in the regulation and control of the manner of use of these streets and highways is to strike at the basic foundation of local development. To hamper unnecessarily such control prevents that balancing of the manner of use which is essential to the general benefit of the whole public. Such a restriction of the local regulatory power would not only be destructive of local progress but would make subservient to the unreasonable whims of one group of users, the needs of the whole of the traveling public.

The commerce clause of the constitution cannot be seized upon to accomplish such an end. It was never intended to, and does not, in the circumstance of lack of congressional action, deprive the state and the municipality of power to regulate the manner of use which may be made by an interstate carrier of the streets of the city and the highways of the state.

Undoubtedly counsel for respondent will urge upon the court that a cataclysm will befall interstate carriers by motor coach if this court applies the principle that the commerce clause does not guarantee to such carriers the unrestricted, unregulated use of the highways. No more complete answer to this argument can be given than that furnished by Mr. Justice Harlan in dealing with a like conjectured dread, *Lake Shore, etc. Railway Co.* v. *Ohio,* 173 U. S. 285, 308 (1898):

> "Imaginary cases are put for the purpose of showing what might be done by the State that would seriously interfere with or discriminate against interstate commerce, if the statute in question be upheld as consistent with the Constitution of the United States. Without stopping to consider whether the illustrations referred to are apposite to the present inquiry, it is sufficient to say that it is always easy to suggest extreme cases for the application of any principle embodied in a judicial opinion. Our present judgment has reference only to the case before us, and when other cases arise in which local statutes are alleged not to be legitimate exertions of the police powers of the State, but to infringe upon national authority, it can then be determined whether they are to be controlled by the decision now rendered. It would be impracticable, as well as unwise, to attempt to lay down any rule that would govern every conceivable case that might be suggested by ingenious minds."

In the light of the principles just discussed and the applications pointed out, it is evident that ordinance 1945 does not conflict with any prohibitions of state regulation found in the commerce clause of the federal constitution. The attack upon this ordinance by respondent, premised upon its invalidity under the commerce clause, must fail.

Not for many years has the line of demarcation between the power of the federal government and the power of the states been so much discussed or been so persistently presented to the courts as at the present time. The rights of the states are being championed against what many seem to

think is infringement by the federal government. The present case, in so far as the question of interference with interstate commerce is concerned, directly involves and concerns this controversy. The boundary line of state regulatory power in interstate commerce cases is sufficiently uncertain without further making indefinite its course by tracing therein the capricious sinuosities requested by the respondent.

III.

PETITIONER HAS AUTHORITY UNDER THE INDIANA LAW TO ENACT ORDINANCE 1945.

We come then to the question which perhaps logically should have been first, of determining whether petitioner has, under the law of the state of Indiana, been delegated the power to enact an ordinance of the nature of ordinance 1945. That petitioner has such power is indisputably revealed by even a brief consideration of the Indiana statutes.

Respondent will undoubtedly argue here as it did in the court below that it possesses certificates of public convenience and necessity issued by the public service commission of Indiana, and that the city has no power to pass any regulation affecting the free use of the streets or highways over which it travels under these certificates. Two of these certificates purport to give respondent the right to carry on a local business in the city of Hammond and in the contiguous Indiana city of East Chicago. The public service commission had no power to issue such certicates and they are void (*infra*, 74-89). The other certificate held by respondent purports to authorize a motor bus service carrying interstate passengers only. It purports to be nothing more than a declaration that the interstate carrier has filed insurance. (R. 39-43). At most it can be nothing more than a declaration that the interstate carrier had at the time of the issuance of the certificate complied with applicable state laws. See *Clark* v. *Poor*, 47 Sup. Ct. 702, (1926), *supra*.

Respondent may also go so far as to insist that, since the 1925 session of the Indiana legislature, petitioner has no power to determine who may use its streets for the purpose of furnishing local common carrier motor coach transportation.

There are two answers to these anticipated contentions of respondent. One, which is applicable to these claims as applied to the two certificates purporting to authorize local business, is that these certificates upon which respondent relies are wholly void and were issued in excess of any authority which the public service commission possessed. This will be discussed under heading IV of this brief. The other answer, which disposes of respondent's contentions as applied to all its operations, is that even if the certificates were valid they do not, under the Indiana law, serve to deprive petitioner of its right to regulate, govern and control the use of its streets. A certificate of public convenience and necessity, when lawfully issued by the state commission, merely determines that public convenience and necessity for service exists. It does not, however, give the right to the holder to use the streets and avenues of a city except with the consent of the city, and in conformity with, the regulations made by the city.

It is recognized, of course, that petitioner, as a municipal corporation, is a creature of the legislature. Its powers of police regulation and of proprietary capacities are those fixed by the lawful acts of its creator. No one will dispute that the power to determine who shall control the use of the streets lies solely in the legislature. That body may grant to or withdraw from any governmental agency the privilege of controlling the use of the streets and highways of the state. The question is not as to the source of power; but as to the place where the legislature had lodged the privilege. This can only be determined by a review of the various applicable legislative acts.

The general legislative policy in the state of Indiana has been to vest within the local agency the exclusive control of the streets and avenues within its limits. This policy is clearly stated by the Indiana statutes. That this was the situation when the legislature met in 1925 is apparent from a study of the Indiana laws then in force. (appendix 93-99).

Acts of Indiana 1905, c. 129, sec. 53, sub-divisions 31, 32, 38 and 53, pp. 250-2, 256.

Acts of Indiana 1905, c. 129, secs. 267 and 269, pp. 407-9.

Acts of Indiana 1911, c. 104, sec. 2, p. 181.

Acts of Indiana 1913, c. 76, secs. 97 and 110, p. 200 and 205-6.

The decisions of the supreme court of Indiana remove any possible doubt upon this question, and expressly assert this power of municipalities by ordinance to determine to what extent public conveyances may ply their trade on the streets of a city and may appropriate the use of city streets in the business of receiving and discharging their passengers.

Thus, in *State* v. *Stickelman*, 182 Ind. 102, (1914), *supra*, the state supreme court, after the enactment of the Shively-Spencer utility act, thus summarizes the law on this point, p. 105:

> "The legislature has vested in the municipal authorities almost unlimited control of streets and alleys."

In *State* v. *Denny*, 118 Ind. 449, (1889), that court said, p. 470:

> "There are many things which are included within the definition of police power which are purely local, and of which the State has only an indirect interest, *and which, under our State government, are exclusively within the control of local authorities.* Such we regard • • • control of the streets, sidewalks, sewers and waterworks of a city or town."

And in *Winfield* v. *Public Service Commission,* 187 Ind. 53 (1917), that court said, p. 63:

> "Said act provides that the common council shall have exclusive power over the streets, highways, alleys and bridges within said city for certain named general purposes. The act is broad enough to authorize cities to grant the right of user to public corporations."

This question of the scope of the city's power to control the use to be made of its streets by motor carriers for hire was first presented to the Indiana supreme court in *Frick* v. *City of Gary,* 192 Ind. 76, (1921), *supra.* In that case the city of Gary enacted an ordinance providing:

> "It shall be unlawful for any person, firm or corporation to operate any vehicle, except street cars and taxicabs, engaged in the carriage of passengers for hire, to stop to take on or discharge passengers upon Broadway, Washington street, Massachusetts street, Connecticut street or Adams street, public highways in the city of Gary, etc."

The evidence showed that these streets extended from the north to south city limits, and were the only north and south streets passing through the business district. The ordinance was attacked both as an act in excess of the powers conferred upon the city and as an unconstitutional exercise of alleged power. The ordinance was upheld both in the trial court and upon appeal by the state supreme court. Upon the question of the power of the city to control the use of its streets, the supreme court, after setting out part of the statutes hereinbefore cited, said, p. 84:

> "We think the power to enact and enforce such an ordinance, whenever necessary in the opinion of the common council, was clearly conferred by the statutes above quoted. Burns' 1914, sections 8964, 8655, subds. 31, 38 53; *Peters* v. *City of San Antonio* (Tex. Civ. App.) 195 S. W. 989. We cite below additional decisions of different courts upholding the power of cities to enact and enforce the ordinances therein under consideration for the control of 'jitney busses' in the use of streets. Al-

len v. *Bellingham,* 95 Wash. 12, 163 Pac. 18; *Desser* v. *City of Wichita,* 96 Kan. 820, 153 Pac. 1194, L. R. A. 1916D, 246; *In re Cardinal,* 170 Cal. 519, 150 Pac. 348 L. R. A. 1915F, 850; *Thielke* v. *Albee,* 79 Or. 48, 153 Pac. 793; *Ex Parte Parr.,* 82 Tex. Cr. App. 525, 200 S. W. 404; *Gill* v. *City of Dallas* (Tex. Civ. App.) 209 S. W. 209; *Schoenfeld* v. *City of Seattle,* (D. C.) 265 Fed. 726, 731; *Ex parte Bogle* (78 Tex. Cr. App. 1) 179 S. W. 1193; *Irwin* v. *Atlantic City,* 90 N. J. Law, 99, 100 Atl. 565."

And in *Denny* v. *City of Muncie,* 197 Ind. 28, (1925), *supra,* the state supreme court was again called upon to pass upon the powers of a city in Indiana to control the use of its streets by a class of common carriers. In the *Denny* case the city by ordinance provided:

"No person, firm or corporation shall drive, run or operate any Jitney Bus upon or along any part of any street, avenue or other highway in the city of Muncie upon which there is located a street railway track or tracks upon or over which street cars are regularly operated, * * *."

Again it was contended that this prohibition was void as being an attempted act in excess of the city's power. But the court, in upholding the ordinance, said pp. 33-6:

"The general assembly has granted certain powers to cities in regard to the control of streets and to the regulation of motor vehicle traffic. Every city has exclusive power, by ordinance, to control and care for its streets, and to prevent the obstruction or incumbrance of any of the streets, so as to impede the free use of same for its proper purposes. Sec. 11188, Burns 1926, sec. 8964 Burns 1914. * * *

"* * * In the absence of express statutory authority in the matter of municipal regulation of 'jitneys,' municipal ordinances in regard to same have generally been upheld when based on general statutes vesting in cities the right to control and regulate the use of their streets. Pond Public Utilities (3d Ed.) Sec. 766. In *Frick* v. *City of Gary,* (1922) 192 Ind. 76, 135 N. E. 346, it was held that a municipal corporation of this state has the power to enact an ordinance forbidding vehicles carrying passengers for hire, and excepting therefrom street

cars and taxicabs, from stopping on designated streets to receive or discharge passengers, such ordinance being a regulation of streets * * *.

"In 32 A. L. R. 752, it is said:

'Under the well-settled rule that a municipality, having the power to regulate the use of its streets, may pass any reasonable ordinance within its delegated powers governing automobile traffic on the streets, it has been generally held that a municipality has the right to pass an ordinance prohibiting or limiting the use of certain streets by motor vehicles operated for hire.'

"We hold that the city of Muncie, under the exclusive power granted to cities by the legislature to control and care for their streets, and under the general power granted them to regulate traffic, had the right to enact the parts of the ordinance to which objection has been made. Its power of such control was not restricted to streets which had been improved."

See also:

Sprout v. *City of South Bend*, 198 Ind. 563, (1926), *supra.*

Likewise it has long been the legislative policy in Indiana to allow no public utility to establish itself in a municipality without the consent of the municipality. Under the Shively-Spencer utility act, the consent of the municipality is always necessary before a utility can operate within a city. If an existing like utility is in the field, the consent of the city *and* a certificate of public convenience and necessity from the state public service commission must be secured.

Acts of Indiana 1905, c. 129, sec. 254, p. 396 as amended by Acts of Indiana 1911, c. 104, sec. 2, p. 181 (appendix 95-6).

Acts of Indiana 1913, c. 76, sec. 97, p. 200. (appendix, 97).

Farmers' & Merchants' Co-operative Telephone Company v. *Boswell Telephone Company*, 187 Ind. 371, (1918).

It is clear then that when the legislature met in 1925 the cities of Indiana were vested with power to control, regulate, limit and restrict the manner and extent of the use of their streets by common carriers.

At the 1925 session the Indiana legislature declared motor busses operating as common carriers to be public utilities and subjected them to certain regulations as utilities. This is the act which is commonly known as the Moorhead act.

At the same legislative session there was enacted a statute consisting of sixty-three sections and containing in general, provisions for the registration and licensing of, and the regulation of the use and operation of, motor vehicles. Section 45 of this act, however, expressly provides that the act shall not be construed as affecting the power of cities to make and enforce ordinances, rules and regulations affecting motor driven commercial vehicles used within their limits for public hire. (appendix, p. 104-5). This provision of section 45 is *identical with a similar section which was in effect at the time of the enactment of the general regulatory act of* 1925. Acts of Indiana 1913, c. 300, sec. 17, p. 790. (appendix, p. 100). The like 1913 provision was before the Indiana supreme court in the cases of *Frick* v. *City of Gary,* 192 Ind. 76, (1922), *supra, Denny* v. *City of Muncie,* 197 Ind. 28 (1925), *supra,* and *Sprout* v. *City of South Bend,* 198 Ind. 563 (1926), *supra.* In this last case the Indiana supreme court said, pp. 571-2:

> "And the facts that he did not have any stations or soliciting agents and did not confine his use of the streets of the city to driving on and along them in carrying interstate commerce, but went upon them with his motor vehicle and there offered the vehicle and his services generally for the use of patrons who would take passage and pay fare to a point in Michigan, using the street both for the solicitation and receipt of passengers, brought his car within the description of a 'motor driven commercial vehicle' and a 'motor driven commercial ve-

> hicle used within the limits (of the city) for public hire,' that may be charged license fees and subjected to regulations by the city notwithstanding the certificate of registration issued by the secretary of state."

The power, which the court in the above cited cases held municipalities possess, to control the use of their streets by common carriers, has already been pointed out. (*supra*, 65-8).

It is evident that this provision of section 45 can have no other effect than to leave the power of cities over motor driven commercial vehicles used for hire, exactly where it was prior to the legislative session of 1925. Unless, therefore, the provisions of the Moorhead act nullify the power of petitioner to control and regulate the use made of its streets by motor bus common carriers, that power remains as broad and exclusive as it was prior to 1925.

Counsel for respondent will, undoubtedly, insist here as he has in the court below, that the power of petitioner to control and regulate the use made of its streets by motor coach common carriers was taken away by the Moorhead act declaring such carriers to be public utilities. This act is set out in full in the appendix, pp. 99-103. The first section of this act, after declaring the business of operating common carrier motor bus service a public utility business, provides that such business "except as herein provided" shall be "subject to all the terms and provisions of" the Shively-Spencer public utility act of 1913, "in so far as the terms and provisions of said act may be reasonably applicable to such carriers."

A proviso contained in section 5 of the act reserved to certain municipalities, including petitioner and the contiguous city of East Chicago, the sole power to determine public convenience and necessity for local common carrier motor bus service. The scope and effect of this section will be discussed under heading IV of this brief. For the moment

we may disregard the fact that the city of Hammond comes within the proviso of section 5 of this act, and consider the situation under the provisions of the act exclusive of section 5.

By section 10 of the act, the legislature expressly asserted that none of the provisions of the act should operate to deprive any public authority of any jurisdiction which it then had or might thereafter acquire over public highways. This section alone, when construed in the light of the provision of section 45 of the general regulatory act, and when construed in the light of the provision of the public utility regulatory act of 1913 above discussed (*supra* 69-70), necessarily has the effect of rendering unlawful intrastate common carrier motor coach operation upon the streets of any Indiana city, unless the consent of the municipality is secured. In case of operations in municipalities not coming within the proviso of section 5 of the Moorhead act, a certificate of public convenience and necessity must also be secured from the public service commission.

Under the Shively-Spencer act no public utility can be forced upon a community against its consent. This theory of dual control is part and parcel of the Shively-Spencer act. To illustrate, under that act if a street car company seeks to establish a system in an Indiana city it must always secure the consent of the city. If there is already a street car system in the city with which it would compete it must also secure a certificate from the public service commission. Without this consent it can not operate, even though it has the consent of the city. So also if it first secures the certificate from the commission this is unavailing to authorize actual operations until the city has consented to the use of its streets by the utility.

Farmers' & Merchants' Co-operative Telephone Co. v. *Boswell Telephone Co.*, 187 Ind. 371 (1918), *supra.*

This idea of dual control is not unusual. It is an essential part of the American idea of government.

Certainly there is nothing in this principle which is not reasonably applicable to the public utility business of operating motor vehicles for hire. The courts cannot arbitrarily refuse to apply these applicable provisions of the 1913 act. The application of this provision is necessary if full effect is to be given to section 10 of the Moorhead act and to the provision in section 45 of the general regulatory act leaving to cities all the powers which they possessed to control and regulate motor driven commercial vehicles used within their limits for public hire.

The supreme court of Indiana has not yet construed the Moorhead act. The question has however been presented to the superior court of Lake county. *Twin City Bus Lines, Incorporated* v. *City of Hammond*, Lake superior court, case number 29374. In that case the bus company is represented by counsel for respondent. The court held that the proper interpretation of the Indiana law is the one here contended for by petitioner. The oral opinion of the court, which was taken down by the court reporter, is set out in the appendix to this brief pp. 107-114. An appeal is now pending in the Indiana supreme court.

Nor is there anything unusual in a requirement that a motor bus common carrier, even though holding a certificate from the commission, cannot operate in or through a city against the consent of the municipality. The question is in each case determined by the specific state statute or constitutional provisions. Examples of such requirements are found in the New York, Masachusetts, Wisconsin, and Michigan laws.

2 Laws of New York 1919, c. 307, p. 942.

Acts and Resolves of Massachusetts 1926, c. 163.

Laws of Wisconsin 1915, c. 546, p. 738.

Highway Motor Bus Company v. *City of Lansing*, 238 Mich. 146 (1927).

This power possessed by all Indiana municipalities to withhold or grant permission to utilities to use the streets is not directly involved in the case at bar. This feature of the Indiana law is here set forth mainly for the purpose of giving this court a complete picture of the extent to which the Indiana legislature has reserved to all municipalities the control over the use of their streets by public utilities. In the light of such far reaching control no serious consideration can be given to any contention that the regulatory provisions of ordinance 1945 are in excess of the powers given to municipalities by the Indiana statutes.

Ordinance 1945 is not an exercise of the general prohibitive power of the municipality. It is merely a regulatory act by which the city council, following its best judgment as to municipal needs, has sought to relieve street congestion and adjust equitably among all classes of traffic the use of the city streets. The ordinance is an attempt by the city to improve and, in part at least, eradicate a dangerous condition on the streets,—a condition which, unless changed, could only become increasingly injurious to public development, safety and welfare.

Under the Indiana law the responsibility is placed on the city authorities to regulate as public necessity requires. A city council which failed to act when need of action arose would, indeed, be derelict in its duty. The enactment of ordinance 1945 is not an usurpation of a power by the city but is an honest attempt at the fulfillment of obligations imposed by the legislature.

It is respectfully submitted that section 10 of the Moorhead act together with the other existing statutory provisions conferring upon the city power to control the use of its streets, is a complete and conclusive answer to any claim of respondent that ordinance 1945 is invalid because the Moorhead act and the general motor vehicle regulatory act of 1925 repealed and took away the power of Indiana municipalities to deter-

mine the use to be made of the streets by public utilities. It is further submitted that there is no merit to the claim that petitioner can no longer regulate the manner in which respondent may use the streets of Hammond. Respondent's claim that it has the right to use the streets of petitioner in defiance of the regulations and in disregard of the restrictions made by petitioner, must be denied.

IV.

THE CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY UPON WHICH RESPONDENT RELIES ARE VOID. RESPONDENT IS ILLEGALLY OPERATING IN INTRASTATE MOTOR BUS SERVICE IN INDIANA. NO INJUNCTION SHOULD HAVE BEEN GRANTED PROTECTING THESE ILLEGAL OPERATIONS OF RESPONDENT.

The arguments already advanced clearly establish that ordinance 1945 is a reasonable regulation, lawfully enacted by the common council of petitioner. They further show that respondent has no right, in conducting its business, to use the streets of petitioner in a manner other than that authorized by petitioner. From the facts disclosed by the record it is obvious that there was a crying need for regulation; and that the regulation adopted bore a direct and reasonable relation to the condition to be remedied. The injunction sought by respondent was therefore properly denied by the district court, and the circuit court of appeals erred in reversing this ruling.

There is however a further, and conclusive reason why the circuit court must be reversed. The decision of that court enjoins enforcement of the ordinance as applied to any of respondent's operations. In so far as this ruling applies to intra-state operations, the decision is clearly wrong for the reason that respondent is carrying on these operations illegally, and therefore is not under any circumstance entitled to an injunction protecting this operation. Even though the ordinance had been invalid, no injunction should have been granted.

The fundamental fallacy of respondent's position throughout this case rests in the fact that respondent has assumed both the validity of its certificates of public convenience and necessity and the sufficiency of these certificates to override local restrictions and regulations. We have already pointed out that under the Indiana law these certificates, even if valid, could only authorize motor coach operation subject to local restrictions and regulations. (*supra* 63-74). As to the interstate business of respondent the sole question is whether the ordinance unduly burdens, or discriminates against, such business. It has been plainly shown that there is no such interference.

Under two of its three certificates respondent claims the right to do a local business in Hammond. As has been shown, under the Indiana law, even if the certificates were valid, respondent can not lawfully operate in local business in petitioner city, until it has been authorized so to do by petitioner. (*supra* 63-74). We shall now point out that these purported certificates are invalid.

A.

IF FOR NO OTHER REASON, THE PURPORTED CERTIFICATES ARE INVALID BECAUSE THEY WERE ISSUED TO A FOREIGN CORPORATION.

The certificates of public convenience and necessity purporting to authorize local service in Indiana are wholly void because issued to a foreign corporation. These purported certificates were issued to Schappi Bus Line, Incorporated. That company is an Illinois corporation. (R. 2). Section 99 of the Shively-Spencer utility act provides (Acts of Indiana 1913 c. 76 sec. 99, p. 201):

> "No license, permit or franchise to own, operate, manage or control any plant or equipment of any public utility shall be hereafter granted or transferred except to a corporation duly organized under the laws of the State of Indiana or to a citizen of such state."

The Moorhead act declares all motor vehicles operating as common carriers for the transportation of passengers for hire to be public utilities, and provides that they shall be subject to the provisions of the Shively-Spencer utility act "in so far as the terms and provisions of said act may be reasonably applicable to such carriers." This does not mean that the public service commission or a court can pick out such provisions as it may select and apply only those. It means that *all provisions* that can reasonably be held applicable must be applied. There is nothing in section 99 that makes it inapplicable to motor vehicle common carriers. Surely there is nothing in the Moorhead act to indicate that the legislature intended to throw aside its long established and advisable policy of requiring that public service in Indiana should be given by Indiana corporations and not by foreign corporations.

No rights ever existed, or now exist, to appellant by reason of the public service commission issuing these alleged certificates.

B.

THE PUBLIC SERVICE COMMISSION OF INDIANA HAS NO JURISDICTION TO GRANT CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY COVERING COMMON CARRIER MOTOR BUS SERVICE WITHIN THE CITY OF HAMMOND.

The public service commission had no power under the law to issue certificates for local service in Hammond and contiguous cities.

Section 5 of the Moorhead act contains the following proviso:

> "And Provided, further, That in any city or town of this state where motor transportation is now furnished under, or by color of, a contract, and in cities and towns contiguous thereto, the board of public works, common council or board of trustees, as the case may be, shall continue to supervise, control, permit, contract for and regulate such service and to determine when, if at all,

for public convenience and necessity competing service shall be established; but the determination of the question of public convenience and necessity for competing service shall be subject to appeal to and review by the circuit or superior courts of the county upon complaint of any interested person filed within twenty days after such finding is made, and in the manner now provided by law for procedure in civil cases, including the right of appeal to the supreme court."

Prior to the enactment of the Moorhead act petitioner had granted a franchise contract providing for a city-wide system of local transportation by motor bus. (R. 55-6). Petitioner therefore is one of the cities of Indiana to which the proviso of section 5 applies. It is clear that under the terms of this proviso the public service commission has no jurisdiction to grant certificates of public convenience and necessity for intrastate motor vehicle service in petitioner or contiguous cities. The commission, however, in complete disregard of the statute, assumed to grant certificates to respondent.

Throughout this case respondent has recognized that the proviso of section 5 is fatal to its claim for an injunction. Respondent contended in the courts below and will undoubtedly contend here that the proper interpretation of the proviso is that petitioner is given the right to continue to regulate and control the franchised carrier but that the public service commission is given the right to grant certificates, to regulate and control any other carriers desiring to operate within the city of Hammond. Thus counsel for respondent has said (brief filed in circuit court of appeals pp. 40-1) that even in municipalities to which the proviso applied "all other carriers, not operating under contract with said City of Hammond within said City, were placed under the jurisdiction of the Public Service Commission". Such contention in the light of the obvious language of the proviso can not win the confidence of any court. It is a claim that while the city continues to regulate the franchised carrier, the commission

has the power to permit other carriers to compete with the franchised carrier, without the consent of the city. Where the legislature has provided that the city "shall continue to supervise, control, permit, contract for and regulate *such service*" counsel for respondent has substituted the provision that the city "shall continue to supervise, control, permit, contract for and regulate *the franchised carrier.*" Where the legislature has provided that *the city* shall "determine when, *if at all*, for public convenience and necessity, competing service shall be established", counsel for respondent would substitute "but the public service commission shall determine when, if at all, for public convenience and necessity, competing service shall be established."

Such flagrant revision of the act will not, of course, receive serious consideration. Respondent is forced to thus revise the act in order to furnish any foundation for any right to carry on the operations in Hammond. Respondent has revised the act to take care of the wrongful assumption of power by the public service commission. Under no possible interpretation or limitation of the proviso can these acts of the commission be sustained. They are simply acts in violation of the legislative will. They are wholly void and give respondent no basis or right.

a.

The Proviso of Section 5 of the Moorhead Act is Constitutional. It Does Not Violate Sections 22 and 23 of the Indiana Constitution.

In order to avoid the fact that the proviso is fatal to respondent's claim that it is operating lawfully, counsel has in the courts below argued that the proviso is unconstitutional. (See assignment of errors R. 84-5.)

Counsel there asserted that the proviso is invalid because in conflict with sections 22 and 23 of article IV of the Indiana

constitution restricting the power of the legislature to pass local or special laws.

Counsel's suggestion appears to be that the proviso can not be sustained as a general law because of an arbitrary classification of cities in regard to motor bus common carrier transportation; that, therefore, the proviso must be considered a local or special law and as such is void because of constitutional restrictions against such a law.

If it were necessary so to do, it could be easily established that the proviso is not a local or special law in the sense within which that term is used in the Indiana constitution. The proviso applies uniformly throughout the state where the same or similar circumstances exist. Every municipality within the state that had prior to the date of the act, undertaken to provide for a system of local motor vehicle transporation is treated alike and given the benefit of the proviso.

However, this question is immaterial. Even assuming that the proviso of section 5 is local and special legislation still that fact can not aid respondent. The proviso is still not violative of constitutional inhibitions.

In arguing that the proviso can not be sustained as a local or special act, counsel for respondent asserts that he relies on sections 22 and 23 of article IV of the constitution of Indiana (R. 84). Counsel has never pointed out in what way he claims section 22 has any application. In truth it has none. Section 22 enumerates seventeen matters as to which the legislature is forbidden to pass special or local laws(appendix 105-6). If the proviso of the Moorhead act were a local law and if it dealt with one of the seventeen matters named in section 22 it would, of course, be invalid. It is beyond dispute that the subject matter of the Moorhead act is not one of those enumerated in section 22. Counsel has apparently merely thrown in section 22 as a part of a vague claim against the validity of the act. Section 22 can then be omitted from further discussion.

Section 23 of article IV of the Indiana constitution provides:

> "In all cases enumerated in the preceding section, *and in all cases where a general law can be made applicable*, all laws must be general, and of uniform operation throughout the state."

The supreme court of Indiana has repeatedly and uniformly held that where the legislature passes a special or local law relating to a subject which is not specifically enumerated in section 22 the courts will not review such legislative determination. The legislature and the legislature alone is the judge of whether a general rather than a local or a special law can be made applicable. The courts can not and will not determine this question. It is a purely legislative one and the decision of the legislature is final.

In the leading case of *Gentile* v. *State*, 29 Ind. 409 (1868), the Indiana supreme court, after denying the contention that an act regulating fishing but excepting fishing in the Ohio and St. Joseph rivers was a local or special act, said, pp. 411-2:

> "* * * *But if it be a local law, still we are not prepared to hold that it is for that reason, in conflict with the section of the constitution before named.* * * * *It is clearly implied by that section,* (section 23) *and we know it to be true in fact, that in many cases local laws are necessary, because general ones cannot, properly and justly, be made applicable.* There are cases where a law would be both proper and necessary in a given locality or part of the state, where its subject is local, or where, *from local facts,* it is rendered necessary; but which, if made general, would either be inoperative in portions of the state, or from its inapplicability to such portions, would be injurious and unjust.
>
> "As the general assembly, then, have the power to pass local laws where general ones cannot be made applicable, and as the constitution does not declare, except in the cases enumerated in section 22, in what particular cases general laws can be made applicable, or designate the proper subjects of local legislation, who is to determine when a law may be local, or when a general law can be properly applied to the particular subject? *Most un-*

questionably those who make the law are necessarily required, in its enactment, to judge and determine, from the nature of the subject, and the facts relating to it, whether it could properly be made general, and of uniform operation throughout the state. If a local law be enacted on a subject not enumerated in section 22, we must presume that, in the opinion and judgment of the legislative department, a general law on the given subject could not be made applicable. Is the determination and judgment of the legislature in such cases conclusive, or is it subject to review and reversal by the courts?" * * *

and after setting forth cogent reasons why the legislative decision should be final, the Indiana supreme court concluded, p. 415:

"For the reasons stated, we are led to the conclusion that it is for the legislature alone to judge whether a law on any given subject, not enumerated in section 22, can be made applicable to the whole State."

In *State* v. *Kolsem,* 130 Ind. 434 (1891), the very argument here made that the act is in reality local, not general, and is void because of section 23 of article IV of the constitution, was advanced by counsel but rejected by the Indiana supreme court. In that case a statute providing for police boards classified cities on the basis of having as inhabitants 14,000 or over of children between six and twenty-one. The subject-matter of the act was not one of the seventeen matters upon which section 22 absolutely forbids local legislation. Counsel there, as here, insisted that the act was in reality local and special, not general; and then urged that as local legislation, it was violative of section 23. The answer of the Indiana supreme court in that case is applicable in reply to the claim here made and is decisive against respondent's contention. It was said, pp. 438-9:

"The subject to which the act under consideration is addressed is not one upon which the Legislature is forbidden to enact special laws. If the subject were one of those enumerated in the section which prohibits the enactment of special laws, we should have a very different

> case from the one before us; but it is not within the classes enumerated, nor can it be brought within the enumeration save by interpolating a provision not written in the Constitution. * * * If the enactment of such a law as the one before us is forbidden, it must be by virtue of section 23 of article 4 of the Constitution, for the subject embraced in the act is not included in the enumeration found in the preceding section. But section 23, as has been again and again decided, does not prohibit the enactment of special laws, where general ones cannot be made applicable. It has also been repeatedly held that whether a general law can be made applicable to a particular subject is exclusively a legislative question, and it necessarily results that if the question is legislative the whole matter, with all its incidents, must be determined by the Legislature. It has been steadily held since the decision in *Gentile* v. *State*, 29 Ind. 409, that the Legislature is the exclusive judge of whether a general law can be made applicable to a subject not enumerated in section 22 of article 4 of the Constitution."

In *Longworth* v. *City of Evansville*, 32 Ind. 322 (1869), an act of the legislature granting to the city of Evansville power to annex certain surrounding territory was held not to be in conflict with section 23 of article IV of the Indiana constitution. The court affirming the principle of the *Gentile* case said, pp. 324-5:

> "This is not a case where a general law is required by the express terms of the constitution. In *Gentile* v. *The State*, 29 Ind. 409, we held, overruling *Thomas* v. *The Board of Commissioners of Clay County*, 5 Ind. 4, that 'it is for the legislature alone to judge whether a law on any given subject, not enumerated in section twenty-two of the constitution, can be made applicable to the whole State.'
>
> "Under this construction, doubtless, special powers might be conferred on any city within the State, as the members of the legislative body, acting under their oaths, might deem the special circumstances of the case required."

In *Mode* v. *Beasley*, 143 Ind. 306 (1896), the Indiana supreme court considered an act providing for the relocation of

a county seat. It was held that section 22 was not involved and the court then said, p. 315:

> "* * * that the enactment of local laws is not forbidden by the two sections of the constitution referred to except on the seventeen subjects enumerated in the twenty-second section and except on other subjects where a general law can be made applicable. And it was further adjudged in that case (*Gentile* v. *State*) that the question whether a general law on such other subjects can be made applicable and of uniform operation throughout the State, rests exclusively in the legislative judgment and discretion, which cannot be reviewed by the courts; and that when the Legislature has determined the question by enacting such a law, that is final and conclusive on that subject."

And in *Smith* v. *Indianapolis Street Ry. Co.*, 158 Ind. 425 (1901), the Indiana supreme court said, p. 438:

> "The fact that the General Assembly enacts a special or local law not comprehended within said section 22 is *per se* a legislative declaration that a general law cannot be made applicable."

See also:

Johnson v. *Board of Commissioners*, 107 Ind. 15 (1886).

School City of Marion v. *Forrest*, 168 Ind. 94 (1906).

Young v. *The Board of Commissioners*, 137 Ind. 323 (1893).

These decisions effectually dispose of any claim that the proviso of section 5 is invalid as a local or special law.

b.

The Equal Protection Clause of the Fourteenth Amendment Does not Inhibit the Proviso of Section 5 of the Moorhead Act.

Counsel for respondent, in his assignment of errors in the circuit court (R. 85), claims that the proviso of section 5 is invalid as violating the fourteenth amendment to the con-

stitution of the United States. Evidently the equal protection clause is the one relied on. Apparently counsel intends to suggest that by reason of the proviso persons desiring to enter into motor vehicle common carrier service in cities within the terms of the proviso do not have the same right to do so if public convenience and necessity demands competing service as have persons desiring to give such service in other municipalities. This suggestion disregards the facts. Such possible objection is carefully guarded against in the proviso. The decision of the municipal authorities upon the question of public convenience and necessity is subject to review by the courts. The legislature has said after providing that the question of the necessity for competing service shall be determined by the municipal authorities:

> "* * * but the determination of the question of public convenience and necessity for competing service, shall be subject to appeal to and review by the circuit or superior courts of the county upon complaint of any interested person filed within 20 days after such finding is made, and in the manner now provided by law for procedure in civil cases, including the right of appeal to the supreme court."

The unsoundness of any suggestion that the state may not delegate to different tribunals the power to determine similar questions was recognized as untenable by this court in *Springfield Gas and Electric Company* v. *City of Springfield*, 257 U. S. 66, 70 (1921).

It has been expressly held by this court that nothing in the fourteenth amendment requires uniformity throughout an entire state in the instrumentalities of governmental control. In *Missouri* v. *Lewis*, 101 U. S. 22 (1879), this court met and disposed of the suggestion made by respondent in this case. It said, pp. 31-2:

> "The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. * * * If diversities of laws and judicial proceedings may exist in the several

states without violating the equality clause in the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same state. * * * Diversities which are allowable in different states are allowable in different parts of the same state."

c.

The Proviso Does Not Violate Section 19 of Article IV of the Indiana Constitution.

Counsel for respondent finally claims that the proviso of section 5 violates section 19 of article IV of the Indiana constitution in that the proviso is not indicated by the title of the act (R. 85).

Section 19 of article IV of the Indiana constitution provides:

"Every act shall embrace but one subject and the matters properly connected therewith, which subject shall be expressed in the title."

The title to the Moorhead act is:

"AN ACT entitled 'An Act to regulate certain carriers of persons and property by motor vehicle for compensation on the public highways of the State of Indiana, and supplemental to an act entitled "An act concerning public utilities, creating a public service commission, abolishing the railroad commission of Indiana, and conferring the powers of the railroad commission on the public service commission," approved March 4, 1913, and declaring an emergency.'"

The statute enacted under this title provides for control by governmental authorities over motor vehicle common carriers. The title to the act says that the act is for the purpose of regulating common carriers by motor vehicle. The act does exactly that thing. The title shows that the act is supplementary to the Shively-Spencer utility commission act. The supplemental act as well as the original act fixes the control of public utilities, determining what powers and control municipal agen-

cies have and what powers and control the public service commission has. Certainly there is nothing in the title to the Moorhead act or in the constitution of Indiana which makes it necessary that the regulatory powers of municipal agencies be set out in one act and that the regulatory powers of the public service commission be set out in another act.

The Moorhead act does exactly what it says. It provides for the regulation of motor vehicle common carriers operating in Indiana. It would be difficult to formulate a more comprehensive title for the act, or to draft one, more succinctly setting forth its substance and purpose. The act is an act regulating "*certain carriers*" for hire and is supplementary to the Shively-Spencer act.

The Indiana supreme court has frequently passed upon the requirements of section 19. The Moorhead act is clearly within the limits of these requirements.

The controlling principles have been thus plainly stated in *Maule Coal Co.* v. *Partenheimer*, 155 Ind. 100 (1900), pp. 106-7:

> "To express the subject of a statute in the title, in compliance with the requirement of the Constitution, no particular form or terms are exacted, nor is it essential that such subject be expressed with precision. The title will sufficiently conform to the command of the Constitution if it be so framed and worded as fairly to apprise the legislators, and the public in general, of the subject-matter of the legislation, so as reasonably to lead to an inquiry into the body of the bill. The constitutional requirement may be interpreted to mean that the act and its title must correspond, not literally but substantially, and such correspondence is to be determined in view of the subject-matter to which the legislation relates. *Benson* v. *Christian*, 129 Ind. 535; *State* v. *Kolsem*, 130 Ind. 434, 14 L. R. A. 566; *Lewis* v. *State*, 148 Ind. 346; *Gustavel* v. *State*, 153 Ind. 613; *McCommons* v. *English & Co.*, 100 Ga. 653, 28 S. E. 386.
>
> "In *Lewis* v. *State, supra*, we said: 'The degree of particularity with which the title of an act is to express the subject thereof is not defined by the Constitution, and

rests with the legislature. Courts, in this respect, are inclined to entertain and adhere to a liberal rule, and will not condemn an act of the legislature for the reason alone that the subject thereof is not as fully expressed as it otherwise might have been.'

"If we even entertained a reasonable doubt as to whether the subject of the act in question was as clearly expressed in its title as the Constitution required, in obedience to a well-settled rule, we would be bound to resolve such doubt in favor of the validity of the statute."

And in *Clark* v. *Darr*, 156 Ind. 692 (1901) this constitutional requirement was again explained, p. 697:

"If the title of an act covers a general subject, it is sufficient, and is not open to objections, because it does not proceed further and mention all of the germane matters or details intended to be embraced in and provided for by the act itself. *Bright* v. *McCullough*, 27 Ind. 223; *State* v. *Kolsem*, 130 Ind. 434, and cases cited, 14 L. R. A. 566; *Central Union Tel. Co.* v. *Fehring*, 146 Ind. 189; *Maule Coal Co.* v. *Partenheimer*, 155 Ind. 100."

In *State* v. *Arnold, et al.*, 140 Ind. 628, (1894), the Indiana supreme court asserted, p. 632:

"The criterion is this: If the title fairly gives such notice so as to reasonably lead to an inquiry into the body of the bill, it is all that is necessary. It need not amount to an abstract of its contents."

And in *Marion, B. & E. Traction Co.* v. *Simmons*, 180 Ind. 289 (1913), it was said, pp. 290-1:

"* * * if the title covers a general subject, matters germane to such subject may be included in the act, although not specifically mentioned in the title. Nor is it necessary that details be set out in such title."

In *Mull* v. *Indianapolis etc. Traction Co.*, 169 Ind. 214 (1907) the court said, p. 222:

"'The courts will not resort to a critical construction of the title in order to hold a statute unconstitutional.

> On the contrary, the language of the title is in all cases given a liberal interpretation, and the largest scope accorded to the words employed that reason will permit in order to bring within the purview of the title all the provisions of the act.' "

Furthermore in *Western Union Telegraph Co.* v. *Braxton*, 165 Ind. 165 (1905), the Indiana supreme court said, p. 168:

> "Furthermore, it should be borne in mind that the general subject of the proposed legislation is all that properly belongs to the title of an act, and that the title's exclusive office is to apprise those who shall be called on to vote upon it as to what that subject is. The details and means by which it is proposed to make the law effective in accomplishing its purpose must be looked for, not in the title, but in the body of the bill. Constitution Art. 4, sec. 19."

The proviso of section 5 is relative to the very subject matter named in the title. It deals with public regulation of certain carriers by motor vehicle. It deals with the subject of the title just as much as any of the other provisions of the act. Clearly any contention as to the unconstitutionality of the proviso by reason of the requirements of section 19 of article 4 of the Indiana constitution, must be cast aside.

The proviso of section 5 being effective in Hammond, respondent has no privilege to operate an intra-state common carrier service within the limits of Hammond without first obtaining a franchise from the city. Respondent has never secured nor attempted to secure this franchise. The certificates upon which respondent relies are wholly void. Respondent is unlawfully operating within petitioner city in direct and unauthorized competition with the local franchised carrier. For this reason alone respondent can not have an

standing in a court of equity to protect its illegal intra-state operations. Respondent has come into equity with unclean hands. At the instance of respondent, the court will not pass upon the validity of the ordinance as enforced against its illegal intra-state operations. Even though the ordinance were invalid, even though it were enacted in excess of the city's power, respondent, an unlawful operator, cannot procure an injunction against its enforcement.

Uniformly, courts of equity have taken this view. This position is well illustrated by the supreme court of Indiana in *Pittsburgh, C. C. & St. L. Ry. Co.* v. *Town of Crothersville,* 159 Ind. 330 (1902). In that action plaintiff filed its bill in equity to enjoin the destruction of its stock pens by the board of health and the marshal of Crothersville. The town trustees, acting as a board of health, ordered the abatement of the pens. Plaintiff contended that the act of the trustees was invalid because of a vacancy in the board, and, further, that under the law the board had no power to enter the order and that, if granted the power by the state, their act was in violation of the federal constitution. The Indiana supreme court refused to consider the question of the validity of the order. It said, pp. 336-7:

> "The view we take of this case renders it unnecessary for us to determine either of these contentions of appellant.
>
> It is a well-settled maxim that he who comes into equity must come with clean hands. Here appellant, under the facts found, seeks the aid of equity to enjoin the appellees from abating a public nuisance maintained by it, on the ground that they have no right to abate it. To grant such relief to appellant, who is maintaining the public nuisance, would be contrary to the well-settled principles of equity."

City of Louisville v. *Louisville Home Telephone Co.,* 279 Fed. 949, 960 (1922).

Baker v. *City of Grand Rapids,* 142 Mich. 687, (1906).

Jose v. *Utley*, 185 Cal. 656, (1921).

Slovanian Association v. *City of Portland*, 111 Ore. 335, (1924).

Village of Cedar Springs v. *Schlick*, 81 Mich. 405, (1890).

Clearly, then, the only complaint which respondent can be heard to make against the validity of ordinance 1945 is its complaint as an interstate carrier that the ordinance, in regulating the manner in which motor vehicle common carriers for hire may use the city streets and classifying between lawfully operating local carriers and interurban carriers (in case of respondent, an interstate interurban carrier), unduly burdens interstate commerce. We are confident that this contention has been adequately refuted by the arguments already made.

CONCLUSION.

The circuit court of appeals in its decision held invalid as applied to all the motor bus operations of respondent, each of the provisions made by petitioner in ordinance 1945, for the regulation of common carrier traffic upon its streets. That decision unduly and improperly invades the power of the municipality to legislate for the local welfare.

We are confident that the argument advanced in this brief establishes beyond question that the acts of petitioner are not in excess of its power and are not violative of any federal or state constitutional restriction. It necessarily follows that the decision of the circuit court must be reversed.

We can not stress too strongly the serious consequences which must necessarily result not only to petitioner but to every other municipality if the ruling of the circuit court should stand. That decision in practical effect operates as a mandate to petitioner to allow respondent and every other motor bus operator the unrestricted use of any street within the city. This is true because the circuit court has based its

decision not upon any particular defect of wording or phraseology in the present ordinance but upon a lack of power in the municipality, under the circumstances disclosed by the record, to regulate. Surely with the condition of congestion shown by the record to exist, the need of municipal regulation cannot be open to real dispute. If in such a situation, regulation will be set aside by the courts, local authorities are powerless to protect and provide for the general welfare.

The principles upon which this case must be reversed are basic and fundamental. If we have been unduly minute in setting forth these principles, which seem almost uncontrovertible, we trust this court will overlook this fact because of the potential dangers of the present decision. The opinion of the circuit court of appeals in this case necessarily limits to an unwarranted degree the power of the state or its municipal agent to regulate and control in a matter essentially local and necessarily best known to local authorities. It contracts, to a wholly unwarranted extent, the scope of freedom of state action permitted by the fourteenth amendment. It gives to the fourteenth amendment a limiting power upon state action such as has never been recognized by this court. It departs from a method of approach that has proved itself upon repeated application,—a test that it is essential to maintain if legislatures and municipal agencies are not to be unduly restricted and hampered in their functions by the courts.

Doubly unfortunate at the present moment is the departure from these principles in a decision involving control of the manner of use of the highways. Day by day, with rapidly increasing traffic, our highways, unless regulation be had, become less capable of performing their function in the development of our social and industrial life. The growing need for adjustment of privileges in the use of the American highway rises more distinctly with each passing day. In the multitude of conflicting demands, the perfect adjustment will not always be reached at each attempt. Time and experience, supplemented by the best judgment of those familiar with local

conditions, alone can make possible a satisfactory solution of the intricate problem of balancing conflicting demands and needs. If constitutional provisions are to be so twisted and expanded as to prohibit these experiments, then there will inevitably follow atrophy of the legislative brain.

Against this judicial interference with the legislative process, this court, speaking through Mr. Justice McKenna, has voiced an admirable warning:

> "But we need not cast about for reasons for the legislative judgment. We are not required to be sure of the precise reasons for its exercise or be convinced of the wisdom of its exercise. It is enough for our decision if the legislation under review was passed in the exercise of an admitted power of government; and that it is not as complete as it might be, not as rigid in its prohibitions as it might be, gives perhaps evasion too much play, is lighter in its penalties than it might be, is no impeachment of its legality. This may be a blemish, giving opportunity for criticism and difference in characterization, but the constitutional validity of legislation cannot be determined by the degree of exactness of its provisions or remedies. New policies are usually tentative in their beginnings, advance in firmness as they advance in acceptance. They do not at a particular moment of time spring full-perfect in extent or means from the legislative brain. Time may be necessary to fashion them to precedent customs and conditions and as they justify themselves or otherwise they pass from militancy to triumph or from question to repeal." *Bunting v. Oregon*, 243 U. S. 426, 437-8 (1917).

We are confident that this court will heed that warning in deciding the case at bar.

Petitioner respectfully submits that the decree of the circuit court of appeals in this case must be set aside, and the decree of the district court affirmed.

Respectfully submitted,

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APPENDIX A.

STATUTORY PROVISIONS.

a.

Acts of Indiana 1905, c. 129.

AN ACT concerning municipal corporations.

Common Council—General Powers.

Sec. 53. The common council of every city shall have power to enact ordinances for the following purposes:

* * *

Thirty-first. To prevent immoderate and careless riding or driving. To regulate the use of streets and alleys by vehicles, and to designate the kind of conveyance and vehicles that may not be used on certain named streets that have been improved, and designate hours for the use of such streets by certain specified classes of vehicles. To prevent the encumbering of streets, alleys, squares, sidewalks and crossings with building, fence or other structure, vehicles, horses or any substance or material whatever interfering with the free use of the same, and to compel the removal of any such obstructions. To regulate the speed of horses, wheeled and other vehicles, cars, and locomotives. To regulate and protect all bridges, culverts, tunnels, viaducts, aqueducts, sewers, canals and hydrants, wholly or partly in such city; and to prohibit digging in such streets, alleys or public places, or in any way injuring, disturbing or making holes in the surface thereof. To regulate the use of sidewalks and prohibit the use of vehicles thereon, and regulate all structures in, under or over the same; and to require the owner or occupant of premises to keep the sidewalks in front of the same free from snow and other obstructions, and to prescribe hours for cleaning the same. To regulate and prevent the throwing or depositing of sweepings, dust, ashes, offal, dirt, garbage, paper, hand bills, slops, liquids or any other materials into any streets, alleys or public places. To regulate and prevent the use of streets, sidewalks and public places for signs, sign posts, awnings, posts, poles, horse troughs,

scales, steps, railings, entrances or racks; or for posting hand bills and advertisements; or for the placing or piling of goods, boxes or other materials, or the display of goods, wares and merchandise. To regulate and prohibit the exhibition or carrying of banners, placards, advertisements or hand bills on the streets, alleys, or public places. To regulate and prevent the flying of flags, banners or signs across the streets, or from houses or other buildings. To regulate the numbering of houses and lots, and to compel the owners to re-number the same, or, in default thereof, to authorize and require the same to be done by the board of public works or other proper authority at the owner's expense, such expense to constitute a lien upon the property which shall be enforcible as may be provided by ordinance. To name or change the name of any street or park. To regulate the making of private connections with sewer, gas, water and other like pipes and public conveniences, and to compel owners of property to bring such connections inside the curbs of streets before the permanent improvement thereof; and, on default of the owner's making such connections, to authorize the proper city officials to do so at the owner's expense, and to make such expense a lien on the property, collectible in the same manner as expenses for other street and sewer improvements; and to authorize the appointment and fix the compensation of a street commissioner or other necessary officers and assistants to keep all streets and alleys clean and free from obstructions to public travel, such street commissioner and other officers in cities of the first, second, third and fourth classes to be appointed by and subject to the direction of the board of public works, and, in cities of the fifth class, to be appointed by the mayor and be subject to the orders of the common council.

Thirty-second. To regulate, tax and license coaches, hacks, drays, automobiles and all other vehicles.

* * *

Thirty-eighth. To license, tax and regulate public hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen, bill posters and all other persons pursuing like occupations for pay or hire, and to prescribe their compensation, and revoke any license for violation of such ordinance.

* * *

Fifty-third. To carry out the objects of the corporation not hereinbefore particularly specified.

* * *

Streets, Alleys, Water Courses, Etc.—Control.

Sec. 267. Every city and town, except when otherwise provided by law, shall, have exclusive power over the streets, alleys, water courses, sewers, drains, bridges and public grounds within such city or town; * * *

* * *

Obstruction of Streets and Public Places.

Sec. 269. Every city and town shall have exclusive power, by ordinance, to control and care for its streets, alleys and other pubic places, and to prevent the obstruction or incumbrance of any such street, alley or other public place, so as to impede the free use of the same for its proper purposes, and to prevent any person from going upon any sidewalk with any vehicle or animal, except in the necessary act of crossing.

b.

Acts of Indiana 1911, c. 104.

AN ACT to amend sections 253, 254, 256 and 257 of an act entitled "An act concerning municipal corporations," approved March 6, 1905, and declaring an emergency.

* * *

Contract for Public Utilities—Limit—Purchase.

Sec. 2. That section 254 of the above entitled act be, and the same is hereby amended to read as follows: Section 254. Any city or town may enter into contract with any person, corporation or association to furnish such city or town and its inhabitants with water, motive power, heat or light, or drainage or sewerage facilities or to build or extend railroads, interurban or street car lines, telegraph or telephone lines, drainage or sewerage system, *or other public conveniences into or through such city or town;* and may provide in such contract the terms and conditions on which such water, motive power, heat, light, drainage, sewerage, railroad, interurban, street car, telegraph or telephone services, *or other uses and accommodations of such and other public conveniences may be furnished by such person, corporation or association to such city or town, and to its inhabitants: Provided,* That no such contract shall be entered into by any such city or town for furnishing such city or town and its inhabitants with water, motive power, drainage, sewerage, heat or light,

upon or along the streets of such city or town for a term longer than twenty-five years: *and, Provided further,* That before any such contract shall be made by any city of the first, second, third, or fourth class, such contract shall be first agreed to by the board of public works of such city, after which agreement such board shall cause a proper ordinance approving and confirming such contract to be presented for adoption by the common council of such city. For the purpose of aiding in the erection or extension of any such public utilities and convenience, any city or town is authorized to become a part stockholder by subscribing to the capital stock thereof in any such corporation so contracting to furnish the city or town and its inhabitants with water, motive power, heat, drainage, sewerage, light and other accommodations aforesaid. And such city or town shall have the power to borrow money to pay for the stock so subscribed or to pay the purchase price for any such gas, electric light, heat or power plant, sewerage or drainage system or other public convenience, and the common council of such city or board of trustees of such town may issue the bonds of such city or town payable at such time or times as such common council or board of trustees may direct, and bearing interest at a rate not exceeding six per centum per annum, payable annually or semi-annually, and may negotiate and sell the same at not less than the face value thereof. The proceeds of such bonds shall be applied only to the payment of the stock so subscribed or to the payment of the purchase price of such gas, electric light, heat or power plant, sewerage or drainage system or other public conveniences: *Provided, however,* That the denominations, time and place of payment of and interest on said bonds shall be in accordance with the terms and provisions of section two hundred and forty-nine of this act.

c.

Acts of Indiana 1913, c. 76.

AN ACT concerning public utilities, creating a public service commission, abolishing the railroad commission of Indiana, and conferring the powers of the railroad commission on the public service commission.

New Franchises—When Granted.

Sec. 97. No license, permit or franchise shall be granted to any person, copartnership or corporation to own, operate, manage or control any plant or equipment of any public utility in any municipality where there is in operation a public utility engaged in similar service under a license, franchise or permit without first securing from the commission a declaration after a public hearing of all parties interested, that public convenience and necessity require such second public utility. Any existing permit, license or franchise which shall contain any term whatsoever interfering with the existence of a second public utility is hereby declared to be against public policy and is hereby amended in such manner as to permit a municipality to grant a license, franchise or permit for the operation of such second public utility pursuant to the provisions of this act.

Must Organize Under Laws of State.

Sec. 99. No license, permit or franchise to own, operate, manage or control any plant or equipment of any public utility shall be hereafter granted or transferred except to a corporation duly organized under the laws of the State of Indiana or to a citizen of such state.

Municipal Council—Powers.

Sec. 110. Every municipal council shall have power, (a) to determine by contract, ordinance or otherwise the quality and character of each kind of product or service to be furnished or rendered by any public utility furnishing any product of service within said municipality and all other terms and conditions not inconsistent with this act upon which such public utilty may be permtted to occupy the streets, highways or other public property within such municipality, and such contract, ordinance or other determination of such municipality shall be in force and prima facie reasonable. Upon complaint made by such public utility or by any qualified complainant as provided in section 57 the commission shall set a hearing as provided in sections 57 to 71 and if it shall find such contract, ordinance or other determination to be unreasonable, such contract, ordinance or other determination shall be void. (b) To require of any public utility by ordinance or otherwise

such additions and extensions to its physical plant within said municipality as shall be reasonable and necessary in the interest of the public, and to designate the location and nature of all such additions and extensions, the time within which they must be completed and all conditions under which they must be constructed subject to review by the commission as provided in subdivision (a) of this section. (c) To provide for a penalty for noncompliance with the provisions of any ordinance or resolution adopted pursuant to the provisions hereof. (d) The power and authority granted in this section shall exist and be vested in said municipalities anything in this act to the contrary notwithstanding: *Provided, however,* Whenever after a request by petition in writing of any public utility, the city or other political subdivision or other body, having jurisdiction of the matter, shall refuse or fail for a period of thirty (30) days, to give or grant to such public utility permission and authority to construct, maintain and operate any additional construction, equipment, or facility reasonably necessary for the transaction of the business of such public utility, and for the public convenience or interest, then such public utility may file a petition with said commission for such right and permission, which petition shall state with particularity the construction, equipment or other facility desired to be constructed and operated, and show a reasonable public necessity therefor, and also the failure or refusal of such city, political subdivision or other body to give or grant such right or permission; and the commission shall thereupon give notice of the pendency of such petition, together with a copy thereof, to such city or other political subdivision or body of the time and place of hearing of the matter set forth in such petition; and such commission shall have power to hear and determine such matters and to give or grant such right and permission and to impose such conditions in relation thereto as the necessity of such public utility and the public convenience and interest may reasonably require.

d.

Acts of Indiana 1913, c. 300.

AN ACT defining motor vehicles and providing for the registration, numbering and regulation of same, defining chauffeurs and providing for the examination and licensing thereof, providing for punishment for the violation of any of the provisions of this act.

Local Ordinances Prohibited.

Sec. 17. * * * *Provided,* That nothing in this act contained shall be construed as effecting the power of municipal corporations to make and enforce ordinances, rules and regulations affecting motor trucks and motor driven commercial vehicles which are used within their limits for public hire, or from making and enforcing reasonable traffic and other regulations except as to rates of speed not inconsistent with the provisions of this act.

e.

Acts of Indiana 1925, c. 46.

AN ACT entitled "An Act to regulate certain carriers of persons and property by motor vehicle for compensation on the public highways of the State of Indiana, and supplemental to an act entitled 'An act concerning public utilities, creating a public service commission, abolishing the railroad commission of Indiana, and conferring the powers of the railroad commission on the public service commission,' approved March 4, 1913, and declaring an emergency."

Motor Vehicle Carriers—Declared to be Public Utilities.

Section 1. *Be it enacted by the general assembly of the State of Indiana,* That every corporation, company, individual, association of individuals, their lessees, trustees or receivers appointed by any court whatsoever, and every city or town, that now or hereafter may own, operate, manage or control any motor vehicle, except as hereinafter provided, for the purpose of transporting passengers or property for compensation as a common carrier upon any of the public highways of the State of Indiana is hereby declared to be a public utility within the meaning of the act of the general assembly of the State of Indiana entitled "An act concerning public utilities, creating a public service commission, abolishing the railroad commission of Indiana, and conferring the powers of the railroad commission on the public service com-

mission," approved March 4, 1913, and, except as herein provided, subject to all the terms and provisions of said act, in so far as the terms and provisions of said act may be reasonably applicable to such carriers.

Public Service Commission—Certificate of Convenience and Necessity—Existing Carriers.

Sec. 2. No motor vehicles, except as hereinafter provided, shall be operated upon any public highway of the State of Indiana for the purpose of transporting passengers or property for compensation as a common carrier until after there shall have been obtained from the public service commission of Indiana a certificate declaring that public convenience and necessity require such operation, and no certificate shall be issued except as hereinafter provided until after a public hearing and a consideration of the service, if any, rendered in the territory of the proposed motor vehicle operation by other motor vehicle common carriers. Such commission is empowered to adopt rules and regulations to govern applications for certificates of convenience and necessity and hearings thereon: *Provided, however*, That the owner of any motor vehicle common carrier service which has been lawfully operated over a fixed route with a substantially regular schedule, upon the highways of the state for a period of ninety days immediately prior to the taking effect of this act and is engaged in such operation at the time of filing application therefor, shall receive from the public service commission a certificate of convenience and necessity to continue such operation, upon submitting to the public service commission within thirty days from the taking effect of this act, verified proof in writing of such continued service and complying with the provision of section 3 of this act, and any certificate owned, held or obtained by any such carrier may be sold, assigned, leased, bequeathed or transferred as other property upon approval by the commission.

Damages Arising from Negligence—Bond, Indemnity, Insurance.

Sec. 3. No motor vehicle, except as hereinafter provided, shall be operated upon any public highway of the State of Indiana for the purpose of transporting passengers or property for compensation as a common carrier until there shall have been filed with the public service commission of Indiana, a bond, indemnity undertaking or policy of insurance, executed by a company (,) mutual association or reciprocal exchange legally authorized to execute such instruments in the

State of Indiana and to the approval of said commission, guaranteeing the payment of all damages which may result from any and all accidents due to negligence in the use or operation of such motor vehicle, which bond, indemnity undertaking or policy shall be payable to the State of Indiana, for the benefit of persons who may suffer personal injuries or property damages on account of such negligence, and shall be in such amount as shall be fixed by such commission at the time of granting a certificate of convenience and necessity for the operation of such motor vehicle.

Definition of "Motor Vehicle" and "Public Highway."

Sec. 4. The term "motor vehicle" as used in this act means any automobile or other self-propelled vehicle not operated or driven upon fixed rails or track, including any trailer thereto attached; and the term "public highway" as used in this act means any public road, street, avenue or alley in the State of Indiana.

Vehicles to Which Act Is Inapplicable—Local Control.

Sec. 5. None of the provisions of this act shall apply to the owning, operation, management or control of taxicabs, hotel buses, funeral buses or school buses or to owning, controlling, operating or managing motor propelled vehicles the major use of which is for private business of the owners and the use of which for hire is only casual or occasional or under special contract or arrangement: *Provided, further,* That in any city or town of this state where motor transportation is now furnished under, or by color of, a contract, and in cities and towns contiguous thereto, the board of public works, common council or board of trustees, as the case may be, shall continue to supervise, control, permit, contract for and regulate such service and to determine when, if at all, for public convenience and necessity competing service shall be established; but the determination of the question of public convenience and necessity for competing service, shall be subject to appeal to and review by the circuit or superior courts of the county upon complaint of any interested person filed within twenty days after such finding is made, and in the manner now provided by law for procedure in civil cases, including the right of appeal to the supreme court. A taxicab as the term used herein means a motor vehicle while being used for the performance of a contract for the transportation of a passenger or passengers for hire to and from points chosen or designated by the passenger or passengers and running over any available route between

such points; but not at the time being operated over or along a definite, advertised, announced or substantially fixed route from, to or between definite or substantially fixed terminals, locations or districts, or according to substantially fixed or announced times or interval of arrival or departure; and a hotel bus, as the term is used herein, means a motor vehicle operated by a hotel company, owner or proprietor in the conveyance of guests between such hotel and a railroad or interurban station.

Steam or Electric Carriages, Motor Vehicles of.

Sec. 6. Any motor vehicle engaged in transporting persons or property upon any of the public highways of the state for any steam or electric common carrier between points on the railroad of such carrier or elsewhere, shall be regarded as a motor vehicle owned, operated, managed or controlled for the purpose of transporting passengers or property for compensation as a common carrier within the meaning of this act.

Construction of this Act.

Sec. 7. Each section of this act is independent of each of the other sections, and adjudication that any provision of this act is invalid shall not affect the validity of any other provision hereof, but such other provisions shall be and remain in full force and effect.

Penalties.

Sec. 8. Any person, firm or corporation which shall violate any of the provisions of this act or fail or refuse to obey any lawful order of the public service commission of Indiana made hereunder shall, on conviction, be fined not less than ten dollars or more than one hundred dollars for each offense, and each day such violation shall continue shall constitute a separate offense.

Legal and Equitable Remedies Available for Enforcement.

Sec. 9. All legal and equitable remedies of a civil nature to enforce the provisions of this act or of any lawful order, rule or regulation made pursuant hereto may be used by said commission of any person or corporation having a special interest in such enforcement.

Highway Commission—Other Authorities—Jurisdiction, Powers.

Sec. 10. This act shall be supplementary to the act entitled "An act concerning public utilities, creating a public service commission, abolishing the railroad commission of Indiana, and conferring the powers of the railroad commission on the public service commission," approved March 4, 1913: *Provided, however,* That none of the provisions of this act shall operate to deprive the state highway commission of Indiana or any other public authorities of any jurisdiction it or they now has or have or which may hereafter be conferred upon it or them over the public highways of the state, nor prevent said state highway commission of Indiana or other authorities from suspending, at any time, the right of motor buses to operate on any public highway where necessary to preserve said highway.

f.

Acts of Indiana 1925, c. 213.

AN ACT providing for the registration and licensing of motor vehicles, motor bicycles, tractors, trailers and semi-trailers, for the regulation of the use and operation thereof on the public highways, defining chauffeurs and providing for the examination and licensing thereof, the suspension and revocation of licenses, and the transfer of ownership, requiring the keeping of certain records of motor vehicles, motor bicycles and motor trucks for which storage, supplies or repairs are furnished, providing that liens may be taken thereon, and prescribing penalties for the violation thereof.

Municipal Regulations—City and Town Licenses.

Sec. 45. Except as herein otherwise provided, no city, town or other municipal corporation shall have any power or authority to make any ordinance, by-laws or resolution, limiting or restricting the use or speed of motor vehicles or motor bicycles, and no ordinance, by-laws or resolution heretofore or hereafter made by any city, town or other municipal corporation within this state, by whatever name known or designated, in respect to or limiting the use of motor vehicles or motor

bicycles, shall have any force, effect or validity, and all such ordinances, by-laws and resolutions are hereby declared to be of no validity or effect. *Nothing in this act contained shall be construed as affecting the power of cities, towns and other municipal corporations to make and enforce ordinances, rules and regulations affecting motor trucks and motor driven commercial vehicles which are used within the limits of such municipal corporations for public hire, or from making and enforcing reasonable traffic and other regulations, except as to rates of speed, not inconsistent with the provisions of this act.* A license issued by any city or town for any motor truck or motor driven commercial vehicle used for hire shall be valid in every city and town of the state for and during the year for which such license is issued, and only one such city or town license shall be required for any such motor vehicle for any one year.

APPENDIX B.

PROVISIONS FROM THE CONSTITUTION OF THE STATE OF INDIANA.

a.

Article I, Section 23.

23. The general assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens.

b.

Article IV, Section 19.

19. Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title.

c.

Article IV, Sections 22 and 23.

22. The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say:

Regulating the jurisdiction and duties of justices of the peace and of constables;

For the punishment of crimes and misdemeanors;

Regulating the practice in courts of justice;

Providing for changing the venue in civil and criminal cases;

Granting divorces;

Changing the names of persons;

For laying out, opening, and working on, highways, and for the election or appointment of supervisors;

Vacating roads, town plats, streets, alleys and public squares;

Summoning and impaneling grand and petit juries, and providing for their compensation;

Regulating county and township business;

Regulating the election of county and township officers, and their compensation;

For the assessment and collection of taxes for (the) state, county, township or road purposes;

Providing for supporting common schools and for the preservation of school funds;

In relation to fees or salaries; except that the laws may be so made as to grade the compensation of officers in proportion to the population and the necessary services required. (As amended March 14, 1881.)

In relation to interest on money;

Providing for opening and conducting elections of state, county or township officers, and designating the place of voting;

Providing for the sale of real estate belonging to minors or other persons laboring under legal disabilities by executors, administrators, guardians or trustees.

23. In all cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the state.

APPENDIX C.

Opinion rendered by Honorable Maurice C. Crites, Judge, Room No. 2, Lake superior court, in the case of *Twin City Bus Lines, Incorporated* v. *City of Hammond* (Lake superior court, Case No. 29374).

The Court: I had intended, if I had time, to write an opinion in this case, because of the many interesting questions that are involved. I do not think it would be fair to leave the matter undecided until after the change is made in the court, and I thought that the better thing to do was to decide it to the best of my ability, in time to permit an appeal to be taken while I could sign the record. I do not want to involve the record in any way by a change in the case from one room to another. I have not been able to write an opinion. However, I think it is fair that I should give my reasons for the position I am taking; and, while I know what one says from the bench usually does not read very well, at the same time I hope that what I shall say may be of some assistance to you in the future. I know whichever way I decide the case will not settle the question,—that it will only be settled eventually by the Supreme Court of this State, if not by the United States Supreme Court.

First, I should like to explain what I felt my attitude should be, because this is an application for a temporary injunction rather than a permanent one.

The evidence is not conflicting in any sense. That, it seems to me, is important in the determination of a case. The questions that determine this case are legal questions mostly. I cannot see any difference between a temporary injunction

and a permanent injunction, if the action of the court is determined by his opinion on the legal questions that are involved.

The whole thing is predicated on what the plaintiff conceived to be its right to operate under these Certificates of Convenience and Necessity issued by the Public Service Commission, without any authority from the City of Hammond and upon the theory that the ordinances are void; that arrests under them interfere with the rights of the plaintiff that are guaranteed to it because of these Certificates of Convenience and Necessity.

The action, of course, is an injunction, which seeks equitable relief,—it is on the equity side of the court.

If I understand the law correctly, you cannot have an injunction to prevent the enforcement of an ordinance of a city simply because the ordinance is void. If that were the only thing that there was in the case, the ground for interference by a court of equity, would not be justified. The same grounds that you would be using for relief in an action in equity are available in the defense of these ordinances.

I found the statement in an Illinois case—I think it is in the 222 Illinois (it is reported in the 78 N. E. 890) which dealt with this question of when you had a right to go into a court of equity for injunctive relief against void ordinances. The rule is laid down in Corpus Juris, Vol. 32, p. 265. These citations that I give, may be the starting point, if you care to follow up this line of reasoning any further than what I give. The rule as I found it is in these words:

The mere validity of an ordinance under which prosecutions are brought, without additional circumstances, bringing the case under some recognized general equity jurisdiction, affords no ground for the issuance of an injunction to restrain prosecutions under them. In such cases the remedy is at law in defense of such prosecutions.

The further reasoning is, that if the ordinances are valid, a court of equity would be powerless to enforce the provisions of the ordinance, or its penalties. All that the court could do would be to prevent, for a time, the exercise of the functions of government.

So, if we concede that the ordinances are invalid for the purpose of our reasoning in this case (although I do not want to be understood as holding them invalid,—we will assume that they are for the purpose of this reasoning), still that fact alone would not authorize injunctive relief.

In order to authorize injunctive relief, you have to have an interference with a plaintiff's right, either a property right or some inherent right. So it would not be sufficient simply to say that the ordinances are void. It seems to me that you must go further and determine the nature of the right plaintiff has to operate upon the streets in question.

If you could say that the steps that the plaintiff has taken do create a property right, then I would concede that, if the ordinances are void, prosecutions under them should be enjoined; but first I think it has to be determined that they are property rights, or at least that the plaintiff has an inherent right to do the things for which he seeks to stop the interference.

Now, I found, in addition to the authorities which you gentlemen cited me that Elliott (Elliott on Roads and Streets, 4th ed. Vol. 4, Sec. 1171.3) has written a chapter on motor bus and motor vehicle transportation. It is not found in the earlier editions. There is also some very helpful treatment on the subject found in Pond, on the subject of utilities.

This is the statement that Elliott gives, and I think it is in perfect harmony with the *Frick* case and the *Denny* case, which you cited and argued quite at length. I haven't the book before me, but in substance this is the rule that Elliott lays down: The right to travel on a highway in the ordinary

way and course of life as one of the general public, is a different thing from the right to make the highway a place of business for private gain by running motor busses for hire. The former use is ordinary and common to all, while the latter is special and extraordinary, and is in the nature of a privilege or permission, which is peculiarly subject to regulation, and generally may be either granted or withheld by the authorities given power over the subject. No one has an inherent and constitutional right to use a highway as a place to carry on a private business and make a profit therefrom, and if he does so without obtaining a franchise so to do, he has no property right to continue doing it.

I think the *Frick* case is cited in this work of Elliott. I believe the *Denny* case was decided after the work was written. But, in any event, that rule as laid down by Elliott, is in perfect harmony with the *Frick* case.

So that, unless it can be said that the Moorhead Law changes this rule, it seems to me that you will have to start with the assumption that there isn't any right of the plaintiff to use the highway to carry on the business of motor bus transportation for hire without a franchise, and no right to continue doing it.

Now, that was the status of the law, as I understand it, prior to the enactment of the Moorhead Act.

Of course, the position of the plaintiff in this case, is that the Certificates of Convenience and Necessity issued by the Public Service Commission, amount in effect to a franchise and that they are property rights.

That position, as I understand it, was predicated largely on the language in Section 2, which, in speaking of these certificates says that "any certificate owned, held, or obtained by any such carrier, may be sold, assigned, leased, bequeathed or transferred as other property, upon approval by the Commission."

Now, if I understand Mr. Whinery's position, it was because of that provision that—

Mr. Whinery: The Oklahoma case that I cited, the *Tulsa* case, held that they were a property right, under a similar statute.

The Court: Of course, whether or not they are property rights, will have to be determined in each instance by the statute in force in the State in question.

I grant you that, to begin with, the State is the one that has authority over the highways, including at least, in Indiana, streets and alleys. You must start with the authority in the State. Now, they may delegate that authority to the local municipalities; they may delegate it to the Public Service Commission; they may first give it to the municipality and take it away from the municipality and give it to the Public Service Commission, or vice versa, or they may leave it in both. There is no rule that I know of that would prevent a state from leaving authority in both of these bodies, at least dividing the jurisdiction to a certain extent between the local authorities and the State authorities, in the form of a Public Service Commission.

Now, without reciting all of these statutes that were in force prior to the enactment of the Moorhead Law,—it does not seem to me that there is any dispute but that the city has control over its streets and alleys.

So, the question is, whether or not the Moorhead Law took that power away from the city and transferred it to the Public Service Commission.

Now, I may say, without prolonging this discussion too much, that I do not think it did. I have studied this Moorhead Law pretty carefully. The language that is used in Section 1 is negative in its character; and then, too, the last section cannot be overlooked. This Section 10 says: "This Act shall be supplementary to the Act entitled, 'An Act con-

cerning public utilities, creating a Public Service Commission, abolishing the Railroad Commission of Indiana, and conferring the powers of the Railroad Commission on the Public Service Commission,' approved March 4, 1913, provided, however, that none of the provisions of this act shall operate to deprive the State Highway Commission of Indiana, or any other public authority of any jurisdiction it or they now has or have, or which may hereafter be conferred upon it or them, over the public highways of the State,''—and then there is the further provision about keeping traffic off the highways where traffic is injurious to the highways.

Now, it seems to me, after a study of the language used throughout this entire act, even if you wipe out Section 5, which is the section in the act that we have had so much argument about here,—if you wipe that out and say that we will consider the whole act with Section 5 taken out, just as if it was not written there at all,—still, it seems to me that the intent of the legislature was never to take all the authority from the cities and towns over motor bus transportation and place it in the hands of the Public Service Commission, because it is a supplementary act, and it seems to me that what it really did was to put motor bus transportation under the Public Utilities Act, that is, the Act of 1913, the same as other utilities were, in that act.

Now, Section 110 of the Act of 1913, explicitly gives cities authority in matters where other kinds of utilities are involved; and I cannot see why there should be any difference between motor bus transportation and other public utilities. As a matter of fact, there is more reason, it seems to me, why local authorities should have control over motor bus transportation on its streets, than it should have over street cars, for instance, because the street car lines are in the middle of the streets, and street cars can only operate over a fixed track, while motor busses may come and go over all parts of the street, in fact, do; and as a matter of fact, I

think they could fairly be said, in some instances, to be more of a local problem than street car transportation is.

So, I am taking the position that even if Section 5 is taken out of the Act, that still I think cities and towns have something to say about motor bus transportation over their streets and alleys.

Now, I do not want to be understood by anything that I have said here as holding that Section 5 is invalid, because I do not see how that would help us any, if it were invalid. I am of the opinion that if Section 5 is invalid, then the whole act is invalid; and if Section 5 is valid, then the Public Service Commission has no authority to issue Certificates of Convenience and Necessity in this city.

So, it is my opinion, gentlemen, that these Certificates of Convenience and Necessity do not foreclose the city from all its jurisdiction over motor bus transportation over the streets. I think that any man, or any corporation that intends to go into the business of motor bus transportation, in order to comply with the law of this State, is required not only to get Certificates of Convenience and Necessity, but is also required to get consent from the city.

Mr. Whinery: How about the Shore Line? They do not have it; neither does the Calumet Motor Coach Company.

The Court: I am glad you asked me that, because I might have overlooked a statement that I think I should make. I do not think it is the function of the Court in this case to decide it on the strength or weakness of the Shore Line case at all. I do not pretend by this decision to say that the Shore Line has a franchise that is valid or not; I do not pretend to say that these ordinances are valid or not; because the position I am taking does not require me to pass upon those questions. I started with the assumption that they were void, and still reached the position that injunctive relief is not proper.

Mr. Whinery: You think, then, that we have an adequate remedy to continue to defend every time our boys are arrested?

The Court: I think this, Mr. Whinery, (I don't know whether I have made myself clear or not)—I think this, that you have not by your pleadings and your affidavits, established a right sufficient to come within the protection of a court of equity, when the only thing you can show, or do show, is a Certificate of Convenience and Necessity, issued by the Public Service Commission.

Mr. Whinery: Can those be attacked collaterally?

The Court: They do not have to be attacked collaterally. You still do not understand me; I do not say these are void. What I say is, you have not done enough—

Mr. Whinery: What do we have to do?

The Court: Why, you have to get the consent of the city to operate your private business on its streets.

The finding of the Court is: The Court finds for the defendants and denies the temporary injunction.